

3024
No. 15418

United States
Court of Appeals
for the Ninth Circuit

BERNARD H. STAUFFER, Appellant,

vs.

SLENDERELLA SYSTEMS OF CALIFORNIA,
INC., a corporation, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 389, inclusive)

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

APR 18 1957

PAUL P. O'DWYER, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of original Transcript of Record.

In The United States District Court, Southern
District of California, Central Division

Civil Action No. 18254-T

BERNARD H. STAUFFER, Plaintiff,

vs.

SLENDERELLA SYSTEMS OF CALIFORNIA,
INC., Defendant.

COMPLAINT

Comes Now the plaintiff, Bernard H. Stauffer, for cause of action against the defendant, and alleges and avers as follows:

I.

Plaintiff, Bernard H. Stauffer, is a citizen of the United States, a resident of the City of Los Angeles, State of California.

II.

Defendant, Slenderella Systems of California, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California and has a regular and established place of business and has committed some of the acts of infringement complained of herein at 610 South Broadway in [2] the City of Los Angeles, State of California.

III.

The jurisdiction of this Court arises under the patent laws of the United States.

IV.

That upon May 6, 1941, Letters Patent of the United States No. 2,240,679 were duly and regularly issued to plaintiff for an invention in muscle relaxing machine and the plaintiff has been since said date and still is the owner of the entire right, title and interest in and to said invention and to said letters patent and the sole right to recover for infringement thereof.

V.

That within the last six years in the southern district of California and elsewhere throughout the United States defendant has infringed said letters patent by manufacturing and using and selling muscle relaxing machines which constitute infringement thereof and defendant will continue such infringement unless restrained by this Honorable Court.

VI.

That plaintiff has affixed to any and all muscle relaxing machines manufactured by plaintiff or with the license and consent of plaintiff a patent notice bearing said patent No. 2,240,679.

Wherefore, plaintiff prays: [3]

A. For a preliminary and perpetual injunction enjoining the defendant, its agents, servants, employees and those acting in concert therewith from infringing said letters patent;

B. For an accounting of damages for said infringement;

C. For its costs and disbursements incurred herein including a reasonable attorney's fees;

D. For such other and further relief as to the Court may seem just.

LYON & LYON,

/s/ By CHARLES G. LYON,
Attorneys for Plaintiff. [4]

[Endorsed]: Filed May 27, 1955.

In The United States District Court, Southern
District of California, Central Division

Civil Action No. 18,254-T

BERNARD H. STAUFFER, Plaintiff,

vs.

SLENDERELLA SYSTEMS OF CALIFORNIA,
INC., Defendant.

vs.

STAUFFER SYSTEM, INC.,
Counter-Defendant.

ANSWER AND COUNTERCLAIMS

The defendant in the above-entitled action answers the Complaint therein as follows:

1.

Defendant admits the averments of Paragraph I of the Complaint. [5]

2.

Answering Paragraph II of the Complaint, defendant denies that it has committed any acts in infringement of Letters Patent No. 2,240,679 in suit at 610 South Broadway, Los Angeles, California, or elsewhere, but admits all of the other averments thereof.

3.

Defendant admits the averments of Paragraph III of the Complaint.

4.

Answering Paragraph IV of the Complaint, defendant admits that upon May 6, 1941, Letters Patent of the United States No. 2,240,679 were issued to plaintiff for an alleged invention in muscle relaxing machine, denies that said Letters Patent were duly or regularly issued, and states that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments thereof.

5.

Defendant denies each and every averment of Paragraph V of the Complaint.

6.

Defendant is without knowledge or information sufficient to form a belief as to the truth of any averment of Paragraph VI of the Complaint. [6]

As Affirmative Defenses to the Complaint, Defendant Avers As Follows:

7.

The defendant has not infringed Letters Patent No. 2,240,679 in suit or any claim thereof.

8.

All of the claims of Letters Patent No. 2,240,679 in suit are invalid because the alleged inventions or discoveries described thereby were patented or disclosed in United States Letters Patent No. 1,978,223, issued to T. M. Parker on October 23, 1934.

9.

All of the claims of Letters Patent No. 2,240,679 in suit are invalid because they fail to comply with Section 112 of Title 35, United States Code, in particular, in failing to particularly point out and distinctly claim the parts, improvements, and combinations alleged to constitute the inventions or discoveries of said Letters Patent.

10.

All of the claims of Letters Patent No. 2,240,679 in suit are invalid because, in view of the state of the art as it existed at the time of, and long prior to, the date of the alleged inventions or discoveries claimed in said Letters Patent, said Letters Patent do not claim any invention or discovery, and do not involve any invention or discovery or contain any patentable novelty, but consist of the mere adoption of well-known devices for the required uses involving only the ordinary faculties of reasoning and skill of a mechanic skilled in the art to which said Letters Patent pertains. [7]

11.

All of the claims of Letters Patent No. 2,240,679 are invalid because each thereof defines merely an old combination of old elements each of which operates in substantially the same way to produce the same result in the device of said Letters Patent as they did individually in the prior art.

12.

While the application for Letters Patent No. 2,240,679 in suit was pending in the United States Patent Office the applicant therefor so limited and confined the claims of said application, under the requirements of the Commissioner of Patents, that plaintiff cannot now seek or obtain a construction of any of the claims of said Letters Patent sufficiently broad to cover any device manufactured, used, or sold by the defendant.

13.

All of the claims of Letters Patent No. 2,240,679 in suit are invalid because they cover subject matter not included in the original application as filed for said Letters Patent in suit and are not supported by any oath as required by Section 115, Title 35, United States Code.

14.

Plaintiff is barred from maintaining this action because of misuse of Letters Patent No. 2,240,679 in suit by reason of the following facts and otherwise: (a) plaintiff has licensed the use of apparatus covered by said Letters Patent only upon the condition that the licensee charge prices for such use as fixed

and determined by plaintiff in [8] the following language: "8. The Licensor [plaintiff] will furnish the Licensee with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensee agrees at all times to maintain the said written price schedule as furnished by the Licensor."; (b) plaintiff has licensed the use of apparatus covered by said Letters Patent only upon the condition that the licensee purchase unpatented supplies and equipment from plaintiff in the following language: "12. As a part consideration in granting the Licensee this exclusive franchise, the Licensee agrees to use Stauffer Tables and Stauffer Equipment and Products exclusively, and to purchase, rent, or obtain same solely through the Licensor [plaintiff]. Licensee agrees not to sell or deal in any product or products, or permit the use of any products within any salon established under the terms of this agreement, except such as are manufactured or endorsed by the Licensor."; (c) plaintiff has licensed the use of apparatus covered by said Letters Patent only upon the condition that upon termination of the license the licensee shall thereafter refrain for a period of two (2) years from using certain unpatented business methods known as the "Stauffer System" in the following language: "23. In the event of the termination of this agreement for any reason, the Licensee agrees not to engage in any business predicated upon the principle of the Stauffer System, within the boundaries of the United States for a period of two (2) years after such termination, either directly or

indirectly.”; and (d) upon information and belief plaintiff has given Stauffer System, Inc., a California corporation, the right to grant licenses or sub-licenses under said Letters Patent to use the apparatus covered thereby and said Stauffer System, Inc. has granted such licenses or sub-licenses on the same [9] restrictive terms and conditions as set forth in (a), (b), and (c) above.

15.

Plaintiff cannot maintain this action because of the lack of an indispensable party, to-wit, said Stauffer System, Inc., which, upon information and belief, is the exclusive licensee under Letters Patent No. 2,240,679 in suit.

15a.

Plaintiff, on or about September 25, 1953, by remise and release, released and forever discharged the defendant from all manner of actions, causes, and causes of action, * * * claims and demands, whatsoever, in law or in equity, theretofore existing in favor of the plaintiff, and the action herein falls within the scope of the said release.

As a First Counterclaim Against Plaintiff, Defendant Avers As Follows:

16.

Defendant is a California corporation having a regular and established place of business at Los Angeles, California.

17.

Plaintiff is a citizen of the State of California and resides at Los Angeles, California.

18.

Stauffer System, Inc., is a California corporation having a regular and established place of business at Los Angeles, California. [10]

19.

This counterclaim arises under Sections 2201 and 1338 of Title 28, United States Code, because there is an actual controversy now existing between defendant and plaintiff and Stauffer System, Inc., in respect to which defendant requires a declaration of its rights by this Court, which controversy involves the validity of Letters Patent No. 2,240,679 in suit and its alleged infringement by defendant, which Letters Patent is alleged by plaintiff to be owned by him and infringed by defendant.

20.

Defendant adopts and repeats the averments of Paragraphs 7 to 14, inclusive, set forth above.

21.

Defendant alleges upon information and belief that Stauffer System, Inc., is the exclusive licensee under Letters Patent No. 2,240,679 in suit, and prays leave and permission to amend this counterclaim to add said Stauffer System, Inc., as a party hereto.

As a Second Counterclaim against Plaintiff, Defendant Avers As Follows:

indirectly.”; and (d) upon information and belief plaintiff has given Stauffer System, Inc., a California corporation, the right to grant licenses or sub-licenses under said Letters Patent to use the apparatus covered thereby and said Stauffer System, Inc. has granted such licenses or sub-licenses on the same [9] restrictive terms and conditions as set forth in (a), (b), and (c) above.

15.

Plaintiff cannot maintain this action because of the lack of an indispensable party, to-wit, said Stauffer System, Inc., which, upon information and belief, is the exclusive licensee under Letters Patent No. 2,240,679 in suit.

15a.

Plaintiff, on or about September 25, 1953, by remise and release, released and forever discharged the defendant from all manner of actions, causes, and causes of action, * * * claims and demands, whatsoever, in law or in equity, theretofore existing in favor of the plaintiff, and the action herein falls within the scope of the said release.

As a First Counterclaim Against Plaintiff, Defendant Avers As Follows:

16.

Defendant is a California corporation having a regular and established place of business at Los Angeles, California.

17.

Plaintiff is a citizen of the State of California and resides at Los Angeles, California.

18.

Stauffer System, Inc., is a California corporation having a regular and established place of business at Los Angeles, California. [10]

19.

This counterclaim arises under Sections 2201 and 1338 of Title 28, United States Code, because there is an actual controversy now existing between defendant and plaintiff and Stauffer System, Inc., in respect to which defendant requires a declaration of its rights by this Court, which controversy involves the validity of Letters Patent No. 2,240,679 in suit and its alleged infringement by defendant, which Letters Patent is alleged by plaintiff to be owned by him and infringed by defendant.

20.

Defendant adopts and repeats the averments of Paragraphs 7 to 14, inclusive, set forth above.

21.

Defendant alleges upon information and belief that Stauffer System, Inc., is the exclusive licensee under Letters Patent No. 2,240,679 in suit, and prays leave and permission to amend this counterclaim to add said Stauffer System, Inc., as a party hereto.

As a Second Counterclaim against Plaintiff, Defendant Avers As Follows:

22. Parties

Defendant adopts and repeats the averments of Paragraphs 16, 17 and 18 set forth above.

23.

Defendant alleges upon information and belief [11] that Stauffer System, Inc. is the exclusive licensee under Letters Patent No. 2,240,679 in suit, and prays leave and permission to amend this counterclaim to add said Stauffer System, Inc., as a party hereto.

24. Jurisdiction

Jurisdiction for this Counterclaim arises under Sections 1, 2, 4, 14, 15, and 26, Title 15, United States Code, commonly known as the Sherman Act.

25.

Commencing in the year 1939, plaintiff Stauffer began to manufacture and deliver to users muscle relaxing machines covered by Letters Patent No. 2,240,679 in suit, hereinafter referred to as "Stauffer Tables," and continued to do so until about 1947, during such period delivering large numbers thereof in the State of California and throughout the United States. Such Stauffer Tables have been sold and shipped by plaintiff in interstate commerce to licensees located in states other than the state where the same are manufactured. Some of said Stauffer Tables so delivered were sold outright by plaintiff but as to most of them plaintiff retained title thereto. In connection with such deliveries, plaintiff licensed the use of the Stauffer Tables so delivered by written agreements entered into with

the recipients thereof. Under the terms of many of such agreements, and as a condition to the grant of such licenses, the plaintiff required the licensees to agree to charge prices for the use of such Stauffer Tables as fixed and determined by the plaintiff, required the licensees to purchase unpatented supplies and equipment from plaintiff, required that upon termination of such agreements [12] the licensees refrain from the use of certain unpatented business methods known as the "Stauffer System," and required that during the term of the license the licensees refrain from using any apparatus competitive with Stauffer Tables, all as specifically set forth in Paragraph 14 above.

26.

Stauffer System, Inc., a California corporation, was organized in or about 1947 by plaintiff Stauffer to carry on the business of manufacturing, using, and licensing the use of Stauffer Tables theretofore conducted by the plaintiff Stauffer personally. Upon information and belief, in or about 1947 the plaintiff Stauffer granted to said Stauffer System, Inc. the right to make and rent Stauffer Tables and to grant licenses and sub-licenses under said Letters Patent No. 2,240,679 in suit, and said Stauffer System, Inc. has until the present continued such business in substantially the same manner as set forth in Paragraph 25 above.

27.

Commencing in 1939 the plaintiff Stauffer, and since 1947, the plaintiff and said Stauffer System,

Inc. have restrained trade and commerce among the several states by reason of said licenses aforesaid and otherwise, and have combined and conspired to restrain unreasonably the aforesaid trade and commerce in violation of Section 1 of the Sherman Act; have combined and conspired together to monopolize the aforesaid trade and commerce in violation of Section 2 of the Sherman Act; have attempted to monopolize the aforesaid trade and commerce in violation of Section 2 of the Sherman Act; have monopolized the aforesaid trade and commerce in violation [13] of Section 2 of the Sherman Act and have leased and sold goods, wares, merchandise, machinery, supplies, and other commodities, and fixed prices therefor, on the condition that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, and other commodities of competitors of plaintiff, and the effect thereof has been to substantially lessen competition and tend to create a monopoly in the line of commerce to which business of the plaintiff and Stauffer System, Inc. pertains, in violation of Section 14 of the Sherman Act. The substantial terms of the aforesaid combinations and conspiracies and the means and methods of the attempt to monopolize and monopolization have been:

(a) That the plaintiff alone, and in combination with Stauffer System, Inc. would obtain a monopoly of the business relating to the use of muscle relaxing machines and unpatented supplies and equipment used in connection therewith.

(b) That the plaintiff and said Stauffer System,

Inc. would exclude others from the manufacture, use, and sale of such muscle relaxing machines.

(c) That the plaintiff and Stauffer System, Inc. would threaten to bring and would bring suits for infringement of said Letters Patent No. 2,240,679 for the purpose of discouraging others from manufacturing and selling other muscle relaxing machines and using the same.

(d) That the plaintiff and Stauffer System, Inc. would eliminate and suppress competition between themselves and their licensees by requiring such licensees to adhere to prices fixed by plaintiff and/or Stauffer System, Inc. and to be charged by the licensees for the use of such machines. [14]

(e) That the plaintiff and Stauffer System, Inc. would lessen competition and tend to create a monopoly in their said business by requiring that licensees and purchasers of Stauffer Tables refrain from purchasing or selling unpatented goods, wares, merchandise, machinery, supplies, and other commodities obtained from competitors of plaintiff and Stauffer System, Inc.

28.

The bringing of this patent infringement action by the plaintiff was in furtherance of the unlawful combinations, conspiracies, attempt to monopolize, and monopoly aforesaid and part and parcel thereof.

29.

The aforesaid attempt to monopolize and monopolization and combinations and conspiracies have had the following effects:

(a) The plaintiff and Stauffer System, Inc. have obtained a monopoly of the use of said muscle relaxing machines.

(b) The plaintiff and Stauffer System, Inc. have unreasonably restrained interstate trade and commerce in unpatented supplies and equipment used by their licensees in connection with said muscle relaxing machines.

(c) Competition in the sale and use of muscle relaxing machines has been substantially lessened and there has been a tendency to create a monopoly in plaintiff and Stauffer System, Inc. in connection therewith.

(d) Competition in the sale of unpatented [15] products used and sold in connection with the use of muscle relaxing machines has been substantially lessened and there has been a tendency to create a monopoly in plaintiff and Stauffer System, Inc., in connection therewith.

(e) Defendant has been injured in its business and property to an extent not as yet fully ascertained by the defendant, which prays leave to insert the monetary sum of its damages by appropriate amendment or pleading herein when ascertained.

Wherefore, the defendant and counterclaimant prays as follows:

1. That the Complaint be dismissed with prejudice;

2. That United States Letters Patent No. 2,240,-679, and each and every claim thereof, be adjudged invalid, void, and unenforceable;

3. That United States Letters Patent No. 2,240,-

679, and each and every claim thereof, be adjudged not infringed by any act of defendant;

4. That the combinations and conspiracies in restraint of trade and commerce, the combination and conspiracy to monopolize, the attempt to monopolize and the monopoly charged herein be adjudged and decreed to be unlawful, and that the agreements, contracts, and practices of plaintiff and Stauffer System, Inc. alleged herein be adjudged and decreed to be in violation of Sections 1, 2, and 14 of the Sherman Act;

5. That the Court adjudge and decree that plaintiff and Stauffer System, Inc. have combined to restrain trade and commerce in violation of Section 1 of the Sherman Act; [16]

6. That the Court adjudge and decree that the plaintiff and Stauffer System, Inc., and each of them, have monopolized, attempted to monopolize and combined and conspired to monopolize trade and commerce in violation of Section 2 of the Sherman Act;

7. That the Court adjudge and decree that the plaintiff and Stauffer System, Inc., and each of them, have lessened competition and tended to create a monopoly in violation of Section 14 of the Sherman Act;

8. That the Court adjudge and decree that the plaintiff and Stauffer System, Inc., and each of them, have used said Letters Patent No. 2,240,679 unlawfully in instituting, effectuating, and maintaining the aforesaid offenses;

9. That the Court issue a permanent injunction against the plaintiff, Stauffer System, Inc., their

(a) The plaintiff and Stauffer System, Inc. have obtained a monopoly of the use of said muscle relaxing machines.

(b) The plaintiff and Stauffer System, Inc. have unreasonably restrained interstate trade and commerce in unpatented supplies and equipment used by their licensees in connection with said muscle relaxing machines.

(c) Competition in the sale and use of muscle relaxing machines has been substantially lessened and there has been a tendency to create a monopoly in plaintiff and Stauffer System, Inc. in connection therewith.

(d) Competition in the sale of unpatented [15] products used and sold in connection with the use of muscle relaxing machines has been substantially lessened and there has been a tendency to create a monopoly in plaintiff and Stauffer System, Inc., in connection therewith.

(e) Defendant has been injured in its business and property to an extent not as yet fully ascertained by the defendant, which prays leave to insert the monetary sum of its damages by appropriate amendment or pleading herein when ascertained.

Wherefore, the defendant and counterclaimant prays as follows:

1. That the Complaint be dismissed with prejudice;
2. That United States Letters Patent No. 2,240,-679, and each and every claim thereof, be adjudged invalid, void, and unenforceable;
3. That United States Letters Patent No. 2,240,-

679, and each and every claim thereof, be adjudged not infringed by any act of defendant;

4. That the combinations and conspiracies in restraint of trade and commerce, the combination and conspiracy to monopolize, the attempt to monopolize and the monopoly charged herein be adjudged and decreed to be unlawful, and that the agreements, contracts, and practices of plaintiff and Stauffer System, Inc. alleged herein be adjudged and decreed to be in violation of Sections 1, 2, and 14 of the Sherman Act;

5. That the Court adjudge and decree that plaintiff and Stauffer System, Inc. have combined to restrain trade and commerce in violation of Section 1 of the Sherman Act; [16]

6. That the Court adjudge and decree that the plaintiff and Stauffer System, Inc., and each of them, have monopolized, attempted to monopolize and combined and conspired to monopolize trade and commerce in violation of Section 2 of the Sherman Act;

7. That the Court adjudge and decree that the plaintiff and Stauffer System, Inc., and each of them, have lessened competition and tended to create a monopoly in violation of Section 14 of the Sherman Act;

8. That the Court adjudge and decree that the plaintiff and Stauffer System, Inc., and each of them, have used said Letters Patent No. 2,240,679 unlawfully in instituting, effectuating, and maintaining the aforesaid offenses;

9. That the Court issue a permanent injunction against the plaintiff, Stauffer System, Inc., their

officers, agents, employees, and attorneys, enjoining them, and each of them, and all those in active concert or privity or participating with them, from further violations of Title 15, United States Code as alleged herein;

10. That defendant have and recover from plaintiff and Stauffer System, Inc., its costs and a reasonable attorneys' fee in this action, as provided for by Section 285, Title 35, United States Code;

11. That defendant have and recover from plaintiff and Stauffer System, Inc. on its second counterclaim defendant's actual damages, and that the Court enter judgment thereon the amount of three-fold the actual damages sustained, as provided for by Section 15, Title 15, United States Code, and that defendant have and recover from plaintiff and Stauffer System, Inc. defendant's costs and attorneys' fees as provided in such statute; [17]

12. That defendant be granted such other and further relief as the Court may deem proper.

Dated: August 4, 1955.

NEWLIN, HOLLEY, TACKABURY
& JOHNSTON,
HUDSON B. COX,
HARRIS, KIECH, FOSTER &
HARRIS,
FORD HARRIS, JR.,
DONALD C. RUSSELL,

/s/ By DONALD C. RUSSELL

Attorneys for Defendant. [18]

Acknowledgment of Receipt of Copy Attached.
[Endorsed]: Filed Aug. 4, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Oct. 3, 1955, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge.

Deputy Clerk: Wm. A. White; Reporter: Virginia Wright.

Counsel for Plaintiff: Chas. G. Lyon; Counsel for Defendant: Donald C. Russell and Hudson B. Cox.

Proceedings: For hearing on Defendant's motion for order granting Defendant leave to add Stauffer System, Inc., as a party to the action; for leave to add Stauffer System, Inc., as counter-defendant to "Answer and Counterclaims"; for leave to file and serve third-party complaint; for order granting leave to file amended answer and counterclaims including cross-complaint against Stauffer Systems, etc.

It Is Ordered that motion to bring in Stauffer System, Inc., as a party to the action is granted.

Attorney for defendant is directed to prepare formal order.

JOHN A. CHILDRESS,
Clerk [20]

[Title of District Court and Cause.]

ORDER THAT ADDITIONAL PARTY
BE BROUGHT IN

The motion of defendant Slenderella Systems of California, Inc. to add Stauffer System, Inc., a

California corporation, as a party to the above entitled action having come on regularly to be heard in the above entitled court, the Honorable Ernest A. Tolin, Judge, presiding, on the 3rd day of October, 1955, plaintiff Bernard H. Stauffer being represented by Messrs. Lyon & Lyon by Charles G. Lyon, Esquire, and defendant Slenderella Systems of California, Inc. being represented by Messrs. Harris, Kiech, Foster & Harris by Donald C. Russell, Esquire, and by Messrs. Newlin, Holley, Taackbury & Johnston by Hudson B. Cox, Esquire, and the Court having considered the memorandum filed in support of and in opposition to said motion, and the Court being fully advised in the premises, finds that the addition of Stauffer System, Inc. as a party to said action [21] is required for the granting of complete relief in the determination of the counterclaims of defendant Slenderella Systems of California, Inc.; the Court further finds that jurisdiction over said Stauffer System, Inc. can be obtained and that its joinder will not deprive the Court of jurisdiction of the action.

It Is Therefore Ordered:

1. That Stauffer System, Inc. be added as a party counter-defendant to the counterclaims of defendant Slenderella Systems of California, Inc. herein pursuant to Rule 13 (h) of the Federal Rules of Civil Procedure;

2. That the Clerk of this Court be and he hereby is authorized and directed to amend by interlineation the caption of the answer and counterclaims of defendant Slenderella Systems of California, Inc.

to add Stauffer System, Inc. as a counter-defendant to said counterclaims; and

3. That the Clerk of this Court be and he hereby is authorized and directed to issue under the seal of this Court an alias summons directed to Stauffer System, Inc. requiring it to appear and answer or otherwise plead to the counterclaims of defendant Slenderella Systems of California, Inc. in the above entitled action.

Dated, October 5, 1955.

/s/ ERNEST A. TOLIN,

United States District Judge

Approved as to form.

/s/ CHARLES G. LYON,

LYON & LYON,

Attorneys for Plaintiff [22]

[Endorsed]: Filed Oct. 6, 1955.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIMS

Come now the plaintiff, Bernard H. Stauffer and Stauffer System, Inc., counter-defendants, and in reply to the counterclaims herein aver, allege and deny as follows:

I.

Answering Paragraphs 16 and 17 of said counterclaims, counter-defendants admit the allegations contained therein.

II.

Answering Paragraph 18 of said counterclaims, counter-defendants deny each and every allegation

contained therein and allege that Stauffer System, Inc., a California corporation, was duly wound up and dissolved in May of 1952. [23]

III.

Answering Paragraph 19 of said counterclaims, counter-defendants admit that a controversy exists between defendant and plaintiff involving the validity of Letters Patent No. 2,240,679 in suit and infringement thereof by defendant. Further answering said paragraph, counter-defendants deny that there is any controversy between defendant and Stauffer System, Inc., a defunct corporation.

IV.

Answering Paragraph 20 of said counterclaim, counter-defendants deny each and every allegation contained in Paragraphs 7, 8, 9, 10, 11, 12 and 13 of defendant's answer. Further answering said paragraph, and particularly answering Paragraph 14 of defendant's answer, counter-defendants deny that they are barred from maintaining this action because of any misuse of Patent No. 2,240,679. Further answering said paragraph, and particularly Paragraph 14 of said answer, counter-defendants deny that at any time relevant to this controversy any license granted by plaintiff for the use of the apparatus covered by the Letters Patent in suit contain any of the provisions set forth under sections (a) or (b) of said Paragraph 14. With respect to section (c) of said Paragraph 14, counter-defendants admit that franchises for the use of the Stauffer system contain language substantially to

the same effect as that alleged by defendant at lines 22-27 of Page 5 of defendant's answer and counterclaims. Counter-defendants deny that such franchises constitute a misuse of the patent in suit, and further allege that Stauffer system franchises have been granted in every state in the union under a uniform franchise agreement, and that in some states of the union at least the provision of said agreement quoted in Section (c) of defendant's answer and counterclaims is wholly legal and proper and that in such states of the union under which said [24] agreement is illegal that the same is wholly void and therefore governed by the provisions in said franchise agreement reading as follows:

"If any of the provisions of this agreement are held to be contrary to law and unenforceable, such holding shall not affect or invalidate the other parts of this agreement, and such invalid or unenforceable part shall be deemed separable from the remainder of this agreement."

Further answering Paragraph 14 of said answer, counter-defendants allege that insofar as the provision quoted in section (c) of said paragraph is illegal, it has at no time been enforced by counter-defendants or either of them and that **plaintiff** Stauffer does not intend to attempt to enforce said provision wherever it is illegal and specifically waives his right to so do.

V.

Answering Paragraph 21 of said counterclaims,

such holding shall not affect or invalidate the other parts of this agreement, and such invalid or unenforceable part shall be deemed separable from the remainder of this agreement.”

Further answering said paragraph, counter-defendants allege that insofar as the provision quoted in section (c) of said paragraph is illegal it has at no time been enforced by counter-defendants or either of them and that plaintiff Stauffer does not intend to attempt to enforce said provision wherever it is illegal and specifically waives his right to so do.

X.

Answering Paragraph 26 of said counterclaims, counter-defendants admit that from 1947 to 1952 the business of the Stauffer system was carried on by Stauffer System, Inc., but further allege that said Stauffer System, Inc. was duly wound up and dissolved as of May, 1952. Further answering said paragraph, counter-defendants admit that during the period 1947-1952, Stauffer System, Inc. was granted the right to make and rent and grant licenses and sublicenses under said Letters Patent No. 2,240,679. Further answering said paragraph, counter-defendants deny each and every other allegation contained therein.

XI.

Answering Paragraph 27 of said counterclaims, counter-defendants [27] deny each and every allegation contained therein.

XII.

Answering Paragraph 28 of said counterclaims, counter-defendants deny each and every allegation contained therein.

XIII.

Answering Paragraph 29 of said counterclaims, counter-defendants deny each and every allegation contained therein.

XIV.

Further answering said counterclaims, and each of them, and as a separate and complete defense thereto, counter-defendants allege that said alleged counterclaims and each of them are barred by the provisions of sub-division 1 of Section 338 of the Code of Civil Procedure of the State of California.

Wherefore, counter-defendants pray that the counterclaims of defendant herein be dismissed, and that the defendants take nothing thereby, and that counter-defendants recover from defendant their costs and disbursements herein including reasonable attorneys' fees.

Dated this 12th day of October, 1955.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorney for Counter-
Defendants [28]

Acknowledgment of Service attached. [29]

[Endorsed]: Filed Oct. 12, 1955.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now the counter-defendant, Stauffer Systems, Inc. and in reply to the counterclaims herein hereby adopts the reply thereto filed October 12, 1955, by Bernard H. Stauffer at its reply to said counterclaims.

Dated at Los Angeles, California this 16th day of February, 1956.

STAUFFER SYSTEMS, INC.,

Counter-Defendant,

By LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Counter-

Defendant [34]

Acknowledgment of Service attached. [35]

[Endorsed]: Filed Feb. 17, 1956.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO DEFENDANT AND ANSWERS THERETO

Comes now the plaintiff and propounds the following interrogatories to be answered by an officer of the defendant under oath in accordance with Rule 33 of the Rules of Civil Procedure:

Interrogatory No. I:

“Has defendant at any time since September 25, 1953

- a) manufactured
- b) used
- c) sold or leased

a table adapted to support a human body, having a horizontally extending slot in which is mounted a movable pad?"

Comes now defendant Slenderella Systems of California, Inc. and answers the interrogatories propounded to said defendant as follows: [36]

Answer to Interrogatory No. 1:

Defendant has used but has not manufactured, sold or leased a table approximately as described in said interrogatory, except that the movable pad referred to is not mounted in a slot, but rather over a slot.

Interrogatory No. II:

"If the answer to Interrogatory I is in the affirmative, has defendant during said time manufactured, used, sold or leased more than one type of such table?"

Answer to Interrogatory No. II:

No.

Interrogatory No. V:

"What relationship, if any, exists between defendant and

- a) Slenderella Systems of Illinois, Inc.
- b) Michigan Slenderella Systems, Inc.
- c) Slenderella Systems of Ohio, Inc.
- d) Slenderella Systems of Delaware, Inc.

- e) Evergreen Park Slenderella Systems, Inc.
- f) Blanchette-Mack, Inc.
- g) Any other corporation having as part of its corporate name the word Slenderella?"

Answer to Interrogatory No. V:

No relationship exists between this defendant and the corporations referred to other than the fact that Larry L. Mack, president of the above corporation, is also a stockholder of the other Slenderella corporations referred to. The stock of Blanchette-Mack, Inc. was purchased in part by this defendant pursuant to an arrangement under Chapter 11 of the Bankruptcy Act. [37]

Interrogatory No. VI:

"Does defendant distribute to its salons a manual of instructions for operating the Slenderella Systems?"

Answer to Interrogatory No. VI:

Yes.

Interrogatory No. VII:

"If the answer to Interrogatory I is in the affirmative, does defendant offer said tables for sale

- a) generally
- b) to holders of Stauffer Systems franchises?"

Answer to Interrogatory No. VII:

No.

Interrogatory No. VIII:

"How has defendant been damaged by reason of the facts alleged in paragraph 25 of its counterclaim?"

Answer to Interrogatory No. VIII:

Defendant knows of no specific damage but is ascertaining the facts.

Interrogatory No. IX:

“How has defendant been damaged by reason of the facts alleged in paragraph 26 of its counterclaim?”

Answer to Interrogatory No. IX:

Defendant claims no damage pursuant to this paragraph of its counterclaim.

Interrogatory No. X:

“How has defendant been damaged since September 25, 1953 by reason of the alleged fixing of prices charged by users of Stauffer tables?” [38]

Interrogatory No. XI:

“How has defendant been damaged by the alleged restrictions in Stauffer System licenses?”

Answers to Interrogatories Nos. X and XI:

Defendant now knows of no specific damage, but is ascertaining the facts.

Interrogatories dated Feb. 16, 1956 and signed by Bernard H. Stauffer, Plaintiff, by Lyon & Lyon, by Charles G. Lyon, Attorneys for Plaintiff.

Answers signed by Harris, Kiech, Foster & Harris and Newlin, Holley, Tackabury & Johnston, by Hudson B. Cox, Attorneys for Defendant and Counterclaimant, Slenderella Systems of California, Inc.

Answers Duly Verified. [39]

Affidavit of Service by Mail Attached. [40]

[Endorsed]: Interrogatories Filed Feb. 17, 1956.
Answers Mar. 7, 1956.

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORIES

To correct an error appearing in Answers to Plaintiff's Interrogatories executed March 5, 1956, and filed in the above action on or about March 8, 1956, defendant Slenderella Systems of California, Inc., hereby answers plaintiff's Interrogatory II as follows:

Interrogatory No. II:

"If the Answer to Interrogatory I is in the affirmative, has defendant during said time manufactured, used, sold or leased more than one type of such table?" [59]

Answer to Interrogatory No. II:

Yes.

HARRIS, KIECH, FOSTER &
HARRIS and
NEWLIN, TACKABURY &
JOHNSTON,

/s/ By HUDSON B. COX,

Attorneys for Defendant and Counterclaimant,
Slenderella Systems of California, Inc.

Duly Verified. [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed Oct. 5, 1956.

[Title of District Court and Cause.]

DEFENDANT'S FIRST REQUEST FOR ADMISSIONS AND REPLIES THERETO

Pursuant to Rule 36 of the Rules of Civil Procedure, the defendant in the above-entitled action hereby requests that plaintiff within ten (10) days after service hereof admit in writing the following matters:

Request No. 1: The Franchise Agreement dated March 10, 1946, between B. H. Stauffer and Alvetta Decker, attached hereto as "Exhibit A," is a true copy of such an agreement of that date entered into by and between the parties named therein.

Comes now the plaintiff, Bernard H. Stauffer, and makes answer to the requests for admissions as follows:

Answer: Request No. 1 is admitted.

Request No. 2: The B. H. Stauffer named in said Exhibit A hereto is the plaintiff in this action.

Answer: Request No. 2 is admitted.

Request No. 3: Agreements identical with Exhibit A hereto, or to the printed matter set forth therein, have been entered into by plaintiff with others than said Alvetta Decker.

Answer: Request No. 3 is admitted. [62]

Request No. 4: One or more agreements identical with Exhibit A hereto, as to the printed matter set forth therein, between plaintiff and another or others, were in force and effect on June 2, 1955.

Answer: Request No. 4 is denied.

Request No. 5: One or more agreements identical with Exhibit A hereto, as to the printed matter set forth therein, between plaintiff and another or others, were in force and effect on September 20, 1956.

Answer: Request No. 5 is denied.

Request No. 6: The Franchise Agreement dated July 15, 1948, between Stauffer System, Inc. and Geraldine Scarborough and Juanita Scarborough Kerley, attached hereto as "Exhibit B," is a true copy of such an agreement of that date entered into by and between the parties named therein.

Answer: Request No. 6 is admitted.

Request No. 7: Agreements identical with Exhibit B hereto, as to the printed matter set forth therein, have been entered into by said Stauffer System, Inc. with another or others than said Geraldine Scarborough and Juanita Scarborough Kerley.

Answer: Request No. 7 is admitted.

Request No. 8: One or more agreements identical with Exhibit B hereto, as to the printed matter set forth therein, between said Stauffer System, Inc. and another or others, were in force and effect on June 2, 1955.

Answer: Request No. 8 is denied.

Request No. 9: One or more agreements identical with Exhibit B hereto, as to the printed matter set forth therein, between said Stauffer System, Inc. and another or others, were in force and effect on September 20, 1956.

Answer: Request No. 9 is denied.

Request No. 10: The Franchise Agreement dated November 1, [63] 1949, between Stauffer System, Inc. and Marie Smith, attached hereto as "Exhibit C," is a true copy of such an agreement of that date entered into by and between the parties named therein.

Answer: Request No. 10 is admitted.

Request No. 11: Agreements identical with Exhibit C hereto, as to the printed matter set forth therein, have been entered into by said Stauffer System, Inc. with another or others than said Marie Smith.

Answer: Request No. 11 is admitted.

Request No. 12: One or more agreements identical with Exhibit C hereto, as to the printed matter set forth therein, between said Stauffer System, Inc. and another or others, were in force and effect on June 2, 1955.

Answer: Request No. 12 is denied.

Request No. 13: One or more agreements identical with Exhibit C hereto, as to the printed matter set forth herein, between said Stauffer System, Inc. and another or others, were in force and effect on September 20, 1956.

Answer: Request No. 13 is denied.

Request No. 14: The blank printed form of Franchise Agreement attached hereto as "Exhibit D" is a form of agreement entered into by plaintiff and Sally A. Stauffer, doing business as a co-partnership, with another or others.

Answer: Request No. 14 is admitted.

Request No. 15: One or more agreements in the form exemplified by Exhibit D between plaintiff and said Sally A. Stauffer and another or others were in force and effect on June 2, 1955.

Answer: Request No. 15 is admitted.

Request No. 16: One or more agreements in the form exemplified by Exhibit D between plaintiff and said Sally A. Stauffer and another or others were in force and effect on September 20, 1956.

Answer: Request No. 16 is admitted. [64]

Request No. 17: The blank printed form of Franchise Agreement attached hereto as "Exhibit E" is a form of agreement entered into by plaintiff and Sally A. Stauffer, doing business as a co-partnership, with another or others.

Answer: Request No. 17 is admitted.

Request No. 18: One or more agreements in the form exemplified by Exhibit E between plaintiff and said Sally A. Stauffer and another or others were in force and effect on June 2, 1955.

Answer: Request No. 18 is admitted.

Request No. 19: One or more agreements in the form exemplified by Exhibit E between plaintiff and said Sally A. Stauffer and another or others were in force and effect on September 20, 1956.

Answer: Request No. 19 is admitted.

Request No. 20: On the date that the original Franchise Agreement exemplified by Exhibit A was executed, plaintiff had the right to grant licenses or sublicenses under United States Letters Patent No. 2,240,679 here in suit.

Answer: Request No. 20 is admitted.

Request No. 21: On the date when each of the agreements referred to in Requests 2 and 3, above, was executed, plaintiff had the right to grant licenses or sublicenses under said Letters Patent No. 2,240,679 here in suit.

Answer: Request No. 21 is admitted.

Request No. 22: On the date when each of the agreements referred to in Requests 6, 7, 10 and 11, above, was executed, said Stauffer System, Inc. had the right to grant licenses or sublicenses under said Letters Patent No. 2,240,679 here in suit.

Answer: Request No. 22 is admitted.

Request No. 23: On the date when each of the agreements referred to in Requests 14 and 17, above, was executed, plaintiff and/or said Sally A. Stauffer had the right to grant licenses or sublicenses under said Letters Patent No. 2,240,679 here in suit. [65]

Answer: Request No. 23 is admitted.

Request No. 24: In accordance with Paragraph 8 of Exhibit A hereto, plaintiff directly or indirectly furnished to said Alvetta Decker and/or others parties to similar agreements a written schedule of prices to be charged by them to their customers for "Stauffer System treatments."

Answer: Plaintiff admits that a suggested price list at one time was furnished to franchise holders but such prices were never complied with by the franchise holders or enforced by plaintiff, and such suggestion of prices was discontinued by plaintiff long prior to any time material to this case.

Request No. 25: In accordance with Paragraph

8 of Exhibit B hereto, plaintiff and/or said Stauffer System, Inc. directly or indirectly furnished to said Geraldine Scarborough and/or Juanita Scarborough Kerley and/or other parties to similar agreements a written schedule of prices to be charged by them to their customers for "Stauffer System treatments."

Answer: Plaintiff admits that a suggested price list at one time was furnished to franchise holders but such prices were never complied with by the franchise holders or enforced by plaintiff, and such suggestion of prices was discontinued by plaintiff long prior to any time material to this case.

Request No. 26: There was no substantial difference in mechanical construction or operation between the "Stauffer Tables," referred to in Exhibits A, B, C and E hereto, and the corresponding "Rith-Matic" tables, referred to in Exhibit D hereto.

Answer: Request No. 26 is admitted.

Request No. 27: The "Stauffer System" referred to in Exhibits A, B, C, D and E hereto included the use of four tables differing in construction and mode of operation, such tables being identified by plaintiff as tables No. 1, No. 2, No. 3, and No. 4.

Answer: Request No. 27 is admitted. [66]

Request No. 28: Plaintiff has sold to franchise holders who were parties to franchise agreements of the types exemplified by Exhibits A-E, inclusive, hereto, for resale by them to the public, an unpatented product bearing the name "Staufferettes."

Answer: Request No. 28 is admitted.

Request No. 29: Plaintiff has sold to franchise holders who were parties to franchise agreements of the types exemplified by Exhibits A-E, inclusive, hereto, for resale by them to the public, an unpatented product bearing the name "Skimps."

Answer: Request No. 29 is admitted.

Request No. 30: The only shareholders of said Stauffer System, Inc. since its formation and during its existence have been plaintiff, his wife, and his sister, the said Sally A. Stauffer.

Answer: Request No. 30 is admitted.

Request No. 31: At all times since its formation and during its existence plaintiff has controlled and dictated the policies and operations of said Stauffer System, Inc.

Answer: Request No. 31 is admitted.

Dated: October 12th, 1956.

/s/ BERNARD H. STAUFFER

Requests Dated: This 2nd day of Oct., 1956, at Los Angeles, California. Newlin, Taackabury & Johnston, Hudson B. Cox, Harris, Kiech, Foster & Harris, Ford Harris, Jr., Donald C. Russell, by Ford Harris, Jr., Attorneys for Defendant and Counterclaimant, Slenderella Systems of California, Inc.

Replies Duly Verified. [67]

Acknowledgment of Service attached. [68]

[Endorsed]: Request for Admissions Filed Oct. 3, 1956. Replies Filed Oct. 15, 1956.

[Title of District Court and Cause.]

DEFENDANT'S SECOND REQUEST
FOR ADMISSIONS

Pursuant to Rule 36 of the Rules of Civil Procedure, the defendant in the above-entitled action hereby requests that plaintiff within ten (10) days after service hereof admit in writing the following matters:

1.

The document attached hereto as "Exhibit A" is in substance a copy of a document executed on September 25, 1953, by Bernard H. Stauffer and Stauffer System, Inc. named therein.

Dated: October 30, 1956.

HARRIS, KIECH, FOSTER &
HARRIS and
NEWLIN, TACKABURY &
JOHNSTON,

/s/ By FORD HARRIS, JR.,
Attorneys for Defendant and Counterclaimant,
Slenderella Systems of California, Inc. [69]

[Note: Exhibit A is set out as Exhibit 15 in
the Book of Exhibits.]

Acknowledgment of Service attached. [71]

[Endorsed]: Filed Nov. 2, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO DEFENDANT'S
SECOND REQUEST FOR ADMISSIONS

Comes now the plaintiff, Bernard H. Stauffer, and makes answer to the second request for admissions, dated October 30, 1956, as follows:

Request No. 1: The document attached hereto as "Exhibit A" is in substance a copy of a document executed on September 25, 1953, by Bernard H. Stauffer and Stauffer System, Inc. named therein.

Reply: Plaintiff admits the matter set forth in Request No. 1 quoted above.

/s/ BERNARD H. STAUFFER [73]

Duly Verified.

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Filed Nov. 13, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 13, 1956, at Los Angeles, Calif.

Present: Hon Ernest A. Tolin, District Judge.

Deputy Clerk: Wm. A. White; Reporters alternating: Virginia Wright and A. H. Wahlberg.

Counsel for Plaintiff: Chas. G. Lyon.

Counsel for Defendant: Ford Harris, Jr., and Hudson B. Cox.

Proceedings: For trial. At 2:03 p.m. court convenes herein. All parties are present.

Attorney for plaintiff makes opening statement, and Attorney for defendant makes opening statement.

Plf's Ex. 1 is received in evidence, and Ex. 2 is marked for ident.

Jay Wiener is called, sworn, and testifies for plaintiff.

Plf's Ex. 3 is received in evidence, subject to motion to strike.

Bernard H. Stauffer, plaintiff, is called, sworn, and testifies in his own behalf.

Plf's Ex. 4 is received in evidence.

Plf's Ex. 5 and 6 are received in evidence.

It Is Ordered that further trial is continued to 1:45 p.m., Nov. 14, 1956.

JOHN A. CHILDRESS,

Clerk,

/s/ By WAYNE E. PAYNE,

Deputy Clerk [76]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 14, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge.

Deputy Clerks: W. E. Papyn, S. W. Stacey; Reporters alternating: Virginia Wright and A. H. Wahlberg.

Counsel for Plaintiff: Chas. G. Lyon.

Counsel for Defendant: Ford Harris, Jr., Hudson B. Cox.

Proceedings: For further Court trial. At 1:45 p.m. Court reconvenes herein. All parties are present and Court orders trial proceed.

Bernard H. Stauffer, plaintiff, resumes testifying in his own behalf.

Plf's Ex. 7 to 15 incl. are marked for ident., and Ex. 15 is received in evidence.

Defts' Ex. A-1, A-2, and A-3 are marked for ident.

Plf's Ex. 2 is received in evidence.

At 3 p.m. Court recesses. Court reconvenes after a short recess and all parties are present. Trial proceeds.

Douglas B. Nickerson is called, sworn, and testifies for plaintiff.

Plf's Ex. 16, 17, 18, and 19 are admitted in evidence.

It Is Ordered that cause is continued to 1:30 p.m., Nov. 15, 1956, for further trial.

JOHN A. CHILDRESS,
Clerk [77]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 15, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;

Deputy Clerk: W. E. Payne. Reporter: Virginia Wright.

Counsel for Plaintiff: Chas. G. Lyon.

Counsel for Defendants: Ford Harris, Jr., and Hudson B. Cox.

Proceedings: For further trial. At 1:35 P.M. court convenes herein. All counsel are present.

Plaintiff rests.

Defts'. Ex. B-1 is marked for ident., offered, and received into evidence. Defts'. Ex. B-2 and B-3 are marked for ident., offered, and objected to. Court Sustains objections and orders that said exhibits remain for identification.

Robert M. Knapp, witness for defendants, is called, sworn, and testifies.

Defts'. Ex. C is marked for ident.

At 2:45 P.M. court recesses.

At 3:07 P.M. court reconvenes herein, and all being present as before, trial proceeds.

Robert M. Knapp resumes testifying.

Defts' Ex. D, D-1, D-2, D-3 and E are marked for ident.

Defts' Ex. F is marked for ident.

Defts' Ex. E and F are received into evidence.

Defts' Ex. G to J are marked for ident. and received into evidence.

At 4:22 P.M. Court Orders cause continued to 1:30 P.M., Nov. 16, 1956, for further trial.

JOHN A. CHILDRESS,

Clerk,

By WAYNE E. PAYNE,

Deputy Clerk. [78]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 16, 1956. At: Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;

Deputy Clerk: W. E. Payne. Reporter: Virginia Wright.

Counsel for Plaintiff Charles G. Lyon;

Counsel for Defendants: Ford Harris, Jr., and Hudson B. Cox;

Proceedings: For further trial. Court convenes herein at 1:38 P.M. All parties are present. Court orders trial proceed.

Defts' Ex. C, D, D-1, D-2, and D-3 are received into evidence.

Robert M. Knapp resumes testifying.

Defts' Ex. K is marked, offered, and received into evidence.

At 2:50 P.M. court recesses. At 3:25 P.M. court reconvenes herein, and all being present as before, including counsel for both sides, trial proceeds.

Defts' Ex. L-1 to L-8 incl. are marked for ident. and received into evidence for a limited purpose until further decision by the Court.

Wm. I. Fishbein, witness for defendants, is called, sworn, and testifies.

Counsel for defendants moves to strike Plf's Ex. 3 and Court denies said motion.

Court states that mast-head and sound tract of film will not be considered as evidence.

At 4:12 P.M. It Is Ordered that cause is continued to Nov. 19, 1956, 10:30 A.M. for further trial.

JOHN A. CHILDRESS,
Clerk,
By WAYNE E. PAYNE,
Deputy Clerk. [79]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 19, 1956. At: Los Angeles, Calif.
Present: Hon. Ernest A. Tolin, District Judge;
Deputy Clerk: W. E. Payne. Reporter: Virginia Wright.

Counsel for Plaintiff: Charles G. Lyon.

Counsel for Defendants: Ford Harris, Jr., and Hudson B. Cox.

Proceedings: For further trial. At 11:03 A.M. court convenes herein. All parties are present. Court orders trial proceed.

Court Orders that deposition of plaintiff Bernard H. Stauffer and exhibits thereto filed. Attorney Cox reads portions of said deposition.

Attorney Cox offers Plf's Ex. 12 and 13 into evidence.

Attorney Lyon, for plaintiff, objects to said offer.

Court Orders Plf's Ex. 12 and 13 admitted into evidence.

Counsel for defendants defer evidence re attorneys' fees until Court decides the cause. Defendant rests.

Counsel for defendant withdraws second counter-claim.

On motion of counter-claiming defendant, Court Orders the second counter-claim dismissed.

Bernard H. Stauffer, plaintiff, resumes the stand and testifies in his own behalf in rebuttal.

At noon court recesses to 1:30 P.M. At 1:30 P.M. court reconvenes herein. All parties are present as before. Trial proceeds.

Plaintiff Stauffer resumes testifying.

Plf's Ex. 20 and 21, being the exhibits referred to in the deposition of Bernard H. Stauffer, plaintiff, are marked for identification, offered, stipulated to, and received into evidence.

Plaintiff rests and defendant rests.

Attorney Lyon makes closing argument on behalf of plaintiff.

Attorney Harris make closing argument on behalf of defendants.

Attorney Lyon makes final closing argument on behalf of plaintiff.

Court Finds that claim one is invalid for want of invention.

Counsel for defendants to prepare formal findings, conclusions, and judgment.

At 3:05 P.M. court adjourns.

JOHN A. CHILDRESS,
Clerk,

By WAYNE E. PAYNE,
Deputy Clerk. [80]

In The United States District Court, Southern
District of California, Central Division

Civil Action No. 18,254-T

BERNARD H. STAUFFER, Plaintiff,

vs.

SLENDERELLA SYSTEMS OF CALIFORNIA,
INC., Defendant and Counter-claimant,

STAUFFER SYSTEM, INC.,
Counter-defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

Findings of Fact

1. The plaintiff, Bernard H. Stauffer, is a citizen of the United States and a resident of the City of Los Angeles, State of California.

2. The defendant, Slenderella Systems of California, Inc., is a California corporation having its principal place of business at Los Angeles, California. [81]

3. The Court has jurisdiction of this action under Sections 1338 and 2201 of Title 28, United States Code.

4. The plaintiff, Bernard H. Stauffer, is the owner of United States Letters Patent No. 2,240,679 in suit.

5. Only claim 1 of said Letters Patent No.

2,240,679 in suit is involved in this action, plaintiff at the trial having withdrawn his charge of infringement as to claim 2 of said Letters Patent.

6. Claim 1 of said Letters Patent No. 2,240,679 in suit relates to a muscle relaxing machine for use in treating a human body.

7. Claim 1 of said Letters Patent No. 2,240,679 in suit defines an assemblage of elements all of which were old in the prior art in which they operated in substantially the same way to produce substantially the same result, and such subject matter as a whole would have been obvious to and could have been produced by any person having ordinary skill in the art to which said subject matter pertains.

8. Claim 1 of said Letters Patent No. 2,240,679 is wanting in invention.

9. At the trial of this action the defendant's second counterclaim was withdrawn by stipulation of the parties.

Conclusions of Law

1. The Court has jurisdiction of the parties and over the subject matter set forth in the plaintiff's complaint, and the Court has jurisdiction of the parties and over the subject matter set forth in the defendant's first counterclaim. [82]

2. Claim 1 of said Letters Patent No. 2,240,679 in suit is invalid and void in law for lack of invention.

3. The defendant, Slenderella Systems of California, Inc., is entitled to judgment against the plaintiff, Bernard H. Stauffer, dismissing the complaint with prejudice.

4. The defendant, Slenderella Systems of California, Inc., is entitled to judgment on its first counterclaim herein for declaratory relief, adjudging claim 1 of said Letters Patent No. 2,240,679 in suit invalid and void.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged, and Decreed that:

1. Claim 1 of United States Letters Patent No. 2,240,679 is invalid and void in law.

2. The Complaint for Infringement of United States Letters Patent No. 2,240,679 is hereby dismissed with prejudice and plaintiff shall take nothing by his complaint herein.

3. The First Counterclaim for declaratory relief adjudging claim 1 of United States Letters Patent No. 2,240,679 invalid and void is hereby sustained.

4. The defendant, Slenderella Systems of California, Inc., shall have and recover from the plaintiff, Bernard H. Stauffer, [83] the taxable costs of the defendant in this Court in the sum of \$1,470.93—(Purs. Ord. Fld. 1/9/57).

Dated: This 27th day of November, 1956.

/s/ ERNEST A. TOLIN,

United States District Judge

Approved as to form:

LYON & LYON,

CHARLES G. LYON,

/s/ By CHARLES G. LYON,

Attorneys for Plaintiff. [84]

Acknowledgment of Receipt of Copy Attached. [85]

[Endorsed]: Lodged Nov. 21, 1956. Filed Nov. 27, 1956. Docketed and Entered Nov. 28, 1956.

[Title of District Court and Cause.]

NOTICE

To Bernard H. Stauffer, Lyon & Lyon and Charles G. Lyon, his attorneys:

You, and each of you, are hereby notified that defendant shall apply to the Clerk of the Court at the Post Office Building, Los Angeles, California, in his office, at 9:30 A.M., December 5, 1956, to tax the costs as set forth in the hereto annexed Bill of Costs, in accordance with the [86] provisions of the Federal Rules of Civil Procedure and of the local rules of the United States District Court for the Southern District of California, Central Division.

Dated: December 3, 1956.

HARRIS, KIECH, FOSTER &
HARRIS,
FORD HARRIS, JR.,
DONALD C. RUSSELL,
WALTON EUGENE TINSLEY,
/s/ By WALTON EUGENE TINSLEY,
Attorneys for Defendant and
Counter-claimant. [87]

[Title of District Court and Cause.]

DEFENDANT'S BILL OF COSTS AND
DISBURSEMENTS

1. Certified Copy of File Wrapper and Contents of Patent in suit No. 2,240,679 (Def. Ex. B-1)—\$37.00 (allowed).

2. Copies of three prior art patents (Def. Ex. D-1, 2, 3—75 cents (allowed).

3. Fees of reporter for original of deposition of Bernard H. Stauffer—\$104.48 (allowed) [88]

4. Dr. Fishbein—Witness fees, 5 days, \$20.00 (allowed); mileage, over 100 miles, \$7.00 (allowed); subsistence, 7 days, \$35.00 (allowed).

5. Robert T. Knapp—Witness fees, 4 days, \$16.00 (allowed); mileage, 96 miles, \$6.72 (allowed).

6. Preparation of blown-up charts of patent in suit and prior art patents with attached movable parts of transparent plastic illustrating operation (Def. Ex. E, F, G, H, I, J)—Photo enlargements \$76.44, material \$33.68, labor \$881.24 (disallowed on ground custom does not allow enlargements or models).

7. Preparation of drawing illustrating range of movement of defendant's machines (Def. Ex. C)—\$99.00 (allowed).

8. Preparation of chart with moving arm illustrating comparative movements of patented device and defendant's devices (Def. Ex. K) (disallowed as being a model).

9. Fees of reporter for one-half of cost of original transcript of proceedings at trial obtained for use of the Court, per stipulation of counsel—\$103.12 (allowed).

10. Attorneys' Docket Fee—\$20.00 (allowed).

Total—\$449.07.

The foregoing Bill of Costs and Disbursements taxed and allowed in the sum of \$449.07.

/s/ By JOHN A. CHILDRESS,

Clerk. [89]

Duly Verified. [90]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed December 3, 1956. [91]



[Title of District Court and Cause.]

NOTICE OF AND MOTION TO RE-TAX
COSTS UNDER RULE 54(d) F.R.C.P. AND
LOCAL RULE 15(c)

To: Plaintiff Bernard H. Stauffer; Lyon & Lyon
and Charles G. Lyon, his counsel.

Now comes the defendant Slenderella Systems of California, Inc., and gives notice that on Monday, January 7, 1957, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, in the courtroom of this Court, in the United [92] States Post Office and Court House Building, Los Angeles, California, it will move this honorable

Court to re-tax the defendant's costs, items 6 and 8, disallowed by the Clerk, on December 5, 1956.

In support of this motion said defendant will rely upon the papers and pleadings on file herein and the annexed Memorandum of Points and Authorities.

Dated: At Los Angeles, California, this 10th day of December, 1956.

HARRIS, KIECH, FOSTER &
HARRIS,
FORD HARRIS, JR.,
DONALD C. RUSSELL,
WALTON EUGENE TINSLEY,
NEWLIN, TACKABURY &
JOHNSTON,
HUDSON B. COX,

/s/ By WALTON EUGENE TINSLEY,
Attorneys for Defendant and
Counter-Claimant. [93]

Affidavit of Service by Mail Attached. [97]

[Endorsed]: Filed December 10, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Slenderella Systems of California, Inc. and
Harris, Kiech, Foster & Harris, its attorneys:

Notice is hereby given that Bernard H. Stauffer hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment entered in this action on November 28, 1956.

Dated this 12th day of December, 1956.

LYON & LYON,

/s/ By CHARLES G. LYON,
Attorneys for Plaintiff. [98]

Affidavit of Service by Mail Attached. [99]

[Endorsed]: Filed December 12, 1956.

[Title of District Court and Cause.]

SUPPLEMENTARY AFFIDAVIT RE DEFENDANT'S BILL OF COSTS AND DISBURSEMENTS

State of California

County of Los Angeles—ss.

Walton Eugene Tinsley, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant in the above-entitled cause; that the costs and disbursements listed in [102] Defendant's Bill of Costs and Disbursements are correct and have been necessarily incurred in the defense of this cause; and that the services for which fees have been charged were actually and necessarily performed.

/s/ WALTON EUGENE TINSLEY

Subscribed and Sworn to before me this 14th day of December, 1956.

[Seal] /s/ BERNICE SHOEMAKER,
Notary Public in and for said County and State.

Affidavit of Service by Mail Attached. [104]

[Endorsed]: Filed December 26, 1956.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO RE-TAX
COSTS

This cause having come on for hearing on January 7, 1957, pursuant to defendant's Notice of and Motion to Re-Tax Costs filed December 10, 1956 and plaintiff's Memorandum in Opposition thereto filed on or about December 13, 1956; and oral argument having been heard on said day; and good cause appeared therefor; [105]

It Is Hereby Ordered, Adjudged and Decreed:

That the disallowance by the Clerk of Items 6 and 8 of the defendant's Bill of Costs and Disbursements are reversed.

That the Clerk is hereby directed to tax said Items 6 and 8 as costs in this matter and add costs in the amount of One Thousand Twenty-One and 86/100 Dollars (\$1,021.86) to the costs previously taxed making a total of One Thousand Four Hundred Seventy and 93/100 Dollars (\$1,470.93).

Dated: January 9, 1957.

/s/ ERNEST A. TOLIN,
Judge

Approved as to form, this 9th day of January, 1957.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Plaintiff. [106]

[Endorsed]: Lodged and Filed January 9, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 106, inclusive, containing the original

Complaint;

Answer and Counterclaims;

Order that Additional Party be Brought In;

Reply to Counterclaims;

Interrogatories propounded to Defendant;

Reply to Counterclaim;

Answers to Plaintiff's Interrogatories;

Defendant's First Request for Admissions;

Supplemental Answer to Plaintiff's Interrogatories;

Reply to Defendant's First Request for Admissions;

Defendant's Second Request for Admissions;

Plaintiff's Reply to Defendant's Second Request for Admissions;

Findings of Fact, Conclusions of Law, and Judgment;

Notice of Taxing Costs;

Defendant's Bill of Costs and Disbursements;

Notice of and Motion to Re-Tax Costs;

Notice of Appeal;

Designation of Record on Appeal;

Supplementary Affidavit re Defendant's Bill of Costs and Disbursements;

Order Granting Motion to Re-Tax Costs;

And a full, true and correct copy of the Minutes of the Court on October 3, 1955; November 13, 14, 15, 16, 19, 1956;

B. Three volumes of Reporter's Official Transcript of Proceedings had on November 19, 1956; November 13, 14, 1956; November 15, 16, 1956;

Plaintiff's exhibits 1-21, inclusive and Defendant's exhibits A-1—L-S, inclusive.

I further certify that my fee for preparing the foregoing record amounting to \$2.00, has been paid by appellant.

Witness my hand and the seal of said District Court, this 17th day of January, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court Southern
District of California, Central Division

No. 18,254-T

BERNARD H. STAUFFER, Plaintiff,

vs.

SLENDERELLA SYSTEMS OF CALIFORNIA,
INC., Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Tuesday, November 13, 1956

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Lyon & Lyon,
811 West Seventh Street, Eighth Floor, Los An-
geles, California, By: Charles G. Lyon. [1]*

For the Defendant: Newlin, Holley, Tackabury &
Johnston, 601 West Fifth Street, Suite 1020, Los
Angeles, California, By: Hudson B. Cox. Harris,
Kiech, Foster & Harris, 417 South Hill Street,
Suite 321, Los Angeles, California, By Ford Harris,
Jr. [2]

Tuesday, November 13, 1956; 2:04 P.M.

The Court: Are you ready to proceed?

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

Mr. Lyon: Plaintiff is ready.

Mr. Harris: The defendant is ready, your Honor.

The Court: All right.

Mr. Harris: First, the court please, we have stipulated certain documents and things asked of the plaintiff, to bring them in under subpoena duces tecum, and I might at this time inquire formally as to whether they are here or not.

Mr. Lyon: They will be. I understand our business manager has been delayed en route. He was to bring them.

The subpoena was served, one of them, Friday afternoon after I had left my office and gone to San Francisco, and the other one yesterday which, of course, was a holiday. I did not know anything about them until this morning and I immediately called Mr. Teasdale, our office manager, and asked him to assemble them, and he has been diligently working at them since then. They will be produced.

Mr. Harris: Thank you.

Mr. Lyon: The court please, this is a patent infringement suit brought by the plaintiff Bernard H. Stauffer, who is the inventor,—

The Court: I spent the last two hours reading the file, so I know what is in your trial memorandum and what is in the [3] pleadings. You can take it from there.

I am just saying that so that you will not be repeating material which has already been brought to the court's attention.

Mr. Lyon: Thank you. With that admonition, I will call to the witness stand Mr. Bernard Stauffer.

Mr. Harris: The court please, I would like to make a very brief opening statement before we take Mr. Stauffer's testimony.

The Court: All right.

Mr. Harris: If I may.

The Court: I didn't mean, Mr. Lyon, you can't make one but I am just suggesting that opening statements should expand upon, but should not repeat what has already been brought to my attention by the memorandum.

Mr. Lyon: I think we covered what I intended to say in our trial brief.

The Court: Your opponent apparently has something new.

Mr. Harris: Your Honor, I have some enlargements that I wish to refer to briefly in my statement. I don't know whether I can get the blackboard back there close to the lectern or not. Perhaps I can move it——

The Court: You can speak from where you are there,——

Mr. Harris: Yes.

The Court: ——just so you speak with enough force so [4] that the reporter hears you.

Mr. Harris: Yes, your Honor. I don't know whether your Honor can see that enlargement from there or not.

The Court: Well, I think I can. Some of the smaller portions I might have to come down for, but I will do that if necessary.

Mr. Harris: Yes. I shall merely hit the high

spots now, anyway. I wanted to show the court the patent in suit, the drawing of the patent in suit, and to speak just very briefly on the construction of the patent because I don't believe your Honor has seen the patent in suit.

The Court: Certainly. I have seen a soft copy of it, anyway.

Mr. Lyon: I put a copy on your desk, which is extra, and you can mark it up and tear it apart or do anything you want with it; it is yours.

Mr. Harris: Very well, your Honor. I am very glad of that, that your Honor has seen it.

The Court: I feel, not acquainted to the point that I can technically discuss it—I am not an engineer or draftsman—I do feel that I have a lay acquaintance with the patent in suit, in any event.

Mr. Harris: Yes, your Honor. Thank you. I will be very brief on this.

As your Honor knows, then, this patent relates to a [5] muscle relaxing machine, it is called. There may be some question in the evidence as to whether this machine actually does any muscle relaxing or not. But that will be a secondary point, if it is a point at all.

However, as your Honor undoubtedly is aware, this machine consists of a couch having a slot in the top of the couch, and it has an arm 20 which extends upwardly from a pivot point in its bottom (indicating).

On the top of the arm or support 20 is a flat rectangular applicator or seat 18 (indicating), which is stated in the patent in suit to move be-

tween the two positions shown in Figure 2 of the drawing, that is, the position shown in full lines to the position shown in dotted lines in Figure 2 of the drawing (indicating).

And as it is stated in the patent, that is the limit of motion of this applicator or seat, and the support for it is between the full and dotted line positions in this drawing (indicating). I emphasize that, if the court please, because there is going to be a serious issue in this case for your Honor to decide, as to whether the defendant's tables or machines operate in this same manner as shown in Figure 2 of the patent in suit and as described in the specification for the patent in suit.

We shall, of course, introduce into evidence the file wrapper history and contents of the Stauffer patent in suit. [6]

The Court: Which you say he abandoned—

Mr. Harris: I beg your pardon, your Honor?

The Court: Which you claim that the file wrapper will show that Stauffer in his application claimed what you are now using and then abandoned those claims?

Mr. Harris: Yes, exactly. I wish—

The Court: Yes, he is estopped, if that be true, to assert that they are included within the claims which have been allowed.

Mr. Harris: That is correct, your Honor, exactly right. I now hang on the blackboard, on the easel, an enlargement of the original drawing that was filed with the application for the Stauffer patent in suit. This is page 13 of the file wrapper,

which we shall introduce in evidence. This is merely an enlargement of page 13 of the file wrapper.

As your Honor will see in the original drawing submitted to the Patent Office, which was quite different from the drawing that is in the issued Stauffer patent.

In this drawing, the original drawing, the support Figure 20 and its applicator 18 move between dotted line positions, as shown in the Figure 2 of the drawing, from one side of the vertical to the other side of the vertical. And it is that arc of movement on both sides of the vertical that we are contending that the defendant uses in its machines.

It is that movement which the plaintiff, by canceling this drawing and substituting the drawing that shows in the patent as it issued, which constitutes the abandonment of this very form which is shown in the old original drawing, an abandonment of that form which is the form the defendant is using, so far as the motion of the applicator is concerned.

Now, there are many other differences between the mechanisms of either of these drawings, either the mechanism of the abandoned application drawing or the drawing of the patent in suit as it issued. There are many differences between those structures and the defendant's mechanism.

These differences I have just pointed out are the important ones, and may we say were abandoned by the plaintiff when he discarded this original drawing at page 13 of the file wrapper and substituted for it the drawing which appears in the patent in

suit, which shows an entirely different form of motion of the applicator and support.

I don't believe that the court has seen any of the file wrapper references that were considered by the Patent Office in connection with this patent in suit, nor do I believe that the court has seen any of the three prior art patents upon which the defendant relies.

The Court: That is correct. Those were not included in the memoranda.

Mr. Harris: No. [8]

The Court: They are referred to, but not included.

Mr. Harris: I am sorry, your Honor. I should have included them. At any rate, I will very briefly point out to the court what these three prior art patents disclose so that your Honor may have that in mind during the trial of the case.

First of all, the defendant will rely upon a patent issued to T. M. Parker, No. 1,978,223 on October 23, 1934, sometime prior to the issuance or even the application for the Stauffer patent in suit.

This Parker patent was considered by the Patent Office. It shows a couch which is shown here in Figure 2 in side view in section (indicating). Figure 1 shows a top view of the couch (indicating).

The couch has a slot in its top surface up through which extends a series of six applications (indicating).

Each of these applicators is pivoted at a pivot point 36 and is connected to an arm or bar 23 shown in the Parker patent which, in turn, is con-

nected through a connecting rod and an eccentric driven by a pulley to an electric motor (indicating).

Upon operation of this mechanism the motor drives the pulley, the pulley reciprocates this connecting rod 27 back and forth, to make these applicators pivot about there at pivot points 36 (indicating). They pivot in that manner about those pivot points 36 to give substantially the same [9] motion to the applicators as was true of the applicator shown in the drawing of the original Stauffer patent drawing.

It is a motion on both sides of the vertical here (indicating), exactly as it was in the original patent drawing of Stauffer. That we shall say, of course, is a complete anticipation of the claims in suit. Also, we shall say that there was no invention in the claims in suit, in view of that Parker patent.

But I think that that suffices for the present, to indicate to the court the general construction of the Parker patent, and the fact that these applicators move in the Parker patent in substantially the same way that the applicators move in the defendant's device.

The Court: Well, if that be so, it would have been much safer for this defendant to have simply built his structure on the Parker specification, because that patent has expired.

Mr. Harris: We think we did. We think the defendant did do that exactly. That is our contention, if the court please.

The Court: I don't get that from the drawings you have. Of course, those are Stauffer drawings.

Mr. Harris: Yes, these are the Stauffer drawings we have illustrated here, the drawings in the patent and in the application for the patent.

The Court: Are you contending then your [10] client is vending the Parker device, rather than the Stauffer?

Mr. Harris: Well, if we are vending either one of them, we are vending the Parker device, because our applicators move in the same way.

The Court: Vending or using. I take it even possessing one would be an infringement, wouldn't it?

Mr. Harris: No,—

The Court: If this is an infringing patent.

Mr. Harris: I think it would have to be used. Infringement can only arise through manufacture, use or sale. Unless it is used there would be no infringement.

Mere possession is not sufficient, but we are not concerned with that in the case, anyway, because we admit use of whatever we are making, and use it.

I wanted to point out to the court that that is the type of movement, the same type of movement of the applicators that the defendant has in its tables or machines that are here charged with infringement.

Next, if the court please, we are relying upon another early patent, a patent to Miller, No. 1,953,-424, which issued on April 3, 1934. Again, several years before the application was filed for the Stauffer patent in suit.

The Miller patent, as in Parker, shows a couch or a table which is No. 20 in the drawings of the Miller Patent, and upon which a patient or a user is supposed to lie for [11] these treatments.

It has a pad extending up through a slot in the top surface of the table or couch, which moves to give the desired treatment to the patient or user.

As shown in Figure 4 of the Miller patent, or, I should say Figure 4 of the Miller patent shows more clearly the mechanical construction of the mechanism, including the pad and its mounting and the drive mechanism for operating it.

The evidence will show that this pad can be adjusted in various positions by this linkage mechanism, and when driven the connecting rod 71 is reciprocated back and forth to operate this mechanism, which supports the pad 27, to move the pad forwardly and backwardly, upwardly and downwardly in the same general sort of motion, we suggest, as is shown in drawings of the Stauffer patent in suit and as is described in the specifications for the Stauffer patent in suit. We suggest that this is another prior art patent which shows the same general type of movement as that in the plaintiff's patent in suit.

I might say, if the court please, that this Miller patent was not before the Patent Office when they considered the Stauffer application for his patent. This was a patent that we found in a remote place in the Patent Office, which had not been considered by the Patent Office in its allowance of the Stauffer patent. [12]

Under the well-known rule of law that destroys any presumption of validity attaching to the Stauffer patent by reason of the issuance——

The Court: Well, it does if this is actually an equivalent structure, doesn't it? It doesn't destroy the presumption of validity because there is something else in the art.

Mr. Harris: Oh, certainly not, your Honor. The destruction of the presumption of validity comes through the fact that here was a patent which is possibly even more pertinent to the Stauffer construction than were the patents which were considered by the Patent Office when they considered the Stauffer application.

The Court: And which they overlooked.

Mr. Harris: This one they overlooked, that is correct. Then lastly, we rely upon a patent to Gunderman, No. 1,825,588. This patent is a patent on a portable vibrating machine, as it is called.

It has a motor No. 10 mounted on a base No. 11, upon which is pivotally mounted, at a pivot point 40, and an upstanding arm or support 31 on which is fixed a curved plate 26 on the top (indicating).

The upstanding arm or support 31 is connected to the motor, the drive shaft of the motor, through a connecting rod 50, which is connected to an eccentric or cam which is rotated by the drive shaft of the motor to reciprocate the [13] connecting rod.

That action oscillates this upstanding arm or support 31, on both sides of the vertical, to provide mechanical massage for a patient exactly the same way that the Stauffer patent in suit does, in so far

as the Stauffer patent applies to an oscillation of a plate to provide a mechanical massage.

Of course, this is very much like, if not identical, with the defendant's structure in which it moves on both sides of the vertical by the same general sort of drive (indicating).

It is our contention, of course, that if anyone wants to put a couch around this mechanism of the Gunderman patent, so that you can lie on this plate and thereby massage your back instead of your feet or some other part you can rest on the plate, there is no infringement involved in the thing. As a matter of fact, in the file wrapper of the Stauffer patent in suit Mr. Stauffer's attorney admitted to the Patent Office that couches of this general type here were old in the art (indicating); a matter of public property.

There is nothing new in the couch idea. So we suggest there be no invention in putting a couch around the oscillating plate 26 of the Gunderman patent. Other details of this patent will appear from the evidence.

There are two of these plates sides by side, exactly as in the defendant's mechanism (indicating). They are curved. [14]

Whereas, in Stauffer's the plates are flat. And I ask the court to mark than and mark it well because Claim 1 of the patent in suit says a flat applicator. The defendants use a curved applicator, as used in Gunderman.

We suggest, the court please, that the defendant in its machine follows the construction of these

prior art patents, and does not follow the construction of the Stauffer patent, and the rest of our contentions as to the lack of infringement are set forth in our memorandum.

The Court: Was Gunderman cited in the Patent Office?

Mr. Harris: Again Gunderman was another patent which was not cited in the Patent Office. The Patent Office did not consider Gunderman, did not find it. It is not cited.

The Court: It doesn't appear you reclined to use Gunderman.

Mr. Harris: The patent says you can put your feet on this plate 26 or you may sit on it (indicating). It says also that you may use it to manipulate other parts of the body.

You obviously couldn't lie on this thing, unless you put some kind of supporting structure around it.

But it is a massaging mechanism, as set forth in the Gunderman patent.

The Court: They are all massaging mechanisms of one kind or another, aren't they? [15]

Mr. Harris: Yes.

Mr. Lyon: I think I should point out this is not a massaging mechanism. In all the massaging mechanisms you will find a gear reduction system, so that you don't have what is, in effect, a vibrator; this is a vibrator (indicating).

The Court: Do you contend that Stauffer is not a vibrator?

Mr. Lyon: Stauffer is a manipulator. Of course,

there will be some testimony as to what is the difference between vibration and manipulation. It has to do with the question of rate of speed.

Mr. Harris: But I think, if the court please, with these prior art patents before you at the outset of the case your Honor can better judge the merits of the plaintiff's case here.

Also, at this time, if the court please, I would like to find out from the plaintiff whether the plaintiff is relying upon both Claims 1 and 2 of the Stauffer patent in suit, as being infringed by the defendant, or whether the plaintiff shall only rely upon one of those two claims, and if so, which one.

The Court: He pleads both, doesn't he?

Mr. Lyon: If your Honor please, I had an engineer take the drawings that were submitted to me by the defendant, as [16] showing the two different types of tables they make.

I had him lay them out on these bread boards, which I have here before me (indicating). Unfortunately, when he put them together he took the crank arm that runs to the reciprocated shaft (indicating), which carries the pad in the defendant's device, and substituted it with the crank arm which operates the whole table (indicating), which changed the motion enough so that in the model, as he had it last Friday before we corrected the error, the motion was entirely to one side of vertical. Since we have corrected the model, it presently operates as in accordance with the drawing.

Mr. Harris: Excuse me, Mr. Lyon.

Mr. Lyon: The motion is equally distant on both

sides of the table. And assuming the drawing is correct, I will withdraw the charge of infringement of Claim 2, and we will proceed entirely on Claim 1.

Mr. Harris: Thank you.

Mr. Lyon: Does that conclude your presentation, Mr. Harris?

Mr. Harris: Yes.

Mr. Lyon: I notice I have in the courtroom a gentleman whom I didn't expect to be here. Though it is perhaps a bit out of order I will, with the court's permission, interrupt the usual presentation of the case so that we may present a movie and then the photographer can go on his way. [17]

First, I would like to offer in evidence as Plaintiff's Exhibit 1 a flat copy of the Stauffer Patent No. 2,240,679.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1)

[See Book of Exhibits]

Mr. Lyon: Next I offer in evidence as Plaintiff's Exhibit 2 a unit known as the Stauffer Home Unit, lying here on the floor (indicating), as the Stauffer home unit is used in the movie which we will see.

Mr. Harris: If the court please, I shall have an objection to this unit because it will be our contention that that is not built in accordance with the patent in suit. It is therefore irrelevant and immaterial. I will make the same objection to the movie.

The Court: Well, there is no foundation for this physical structure which you are offering. But there is a foundation by stipulation or, at least, common

consent in your opening statement to the first exhibit which we received.

So you will have to have some foundation for this physical structure and also some foundation for your cinema.

Mr. Lyon: For my what?

The Court: For your movie. I call it a cinema.

Mr. Lyon: Will you take the stand, please?

The Court: We are supposed to use the more [18] elaborate words if we can.

JAY WEINER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your name, sir.

The Witness: Jay Weiner.

Direct Examination

Q. (By Mr. Lyon): What is your occupation, Mr. Weiner?

A. I am the medical director for a division of a Stauffer System called the metabolade.

Q. As medical director of the Stauffer System, have you caused to be photographed in motion picture and in X-ray a person being treated in accordance with the Stauffer System, as you understand it?

A. I have, yes.

Q. Do you have that motion picture with you?

A. I have.

(Testimony of Jay Weiner.)

Q. Are you prepared to show the picture to the court? A. I am.

Q. And does that picture, in accordance with your own knowledge, show the manipulation of the body which is attendant the taking of a Stauffer treatment? A. It does. [19]

Mr. Lyon: With the court's permission, I will now ask the witness to show the court the movie.

The Court: Of course, you are not getting the movie into the record by this method. You get the movie into the record by having the actual film received and then having us see a projection of it.

Q. (By Mr. Lyon): Do you have the film with you, sir? A. Yes.

Mr. Lyon: I offer the film produced by the witness as——

I think we shall mark the home unit, at least, for identification as Exhibit 2 and the movie will be Plaintiff's Exhibit 3.

(The objects referred to were marked Plaintiff's Exhibits Nos. 2 and 3 respectively for identification.)

Mr. Harris: The court please, I should have an objection to the movie. We haven't seen the movie and I think that, in fairness to us as counsel, we should be entitled to see the movie, to permit us to state an objection to it if we think it is objectionable, before it is offered.

The Court: You haven't heard the witness, either?

Mr. Harris: We haven't heard the witnesses, either.

(Testimony of Jay Weiner.)

The Court: It isn't a prerequisite to evidence that it be something, or, the reception of evidence, that offered evidence be something which has been exposed to your view before. We just want to know whether this is a picture of what it [20] purports to be.

You may voir dire the witness on that, if you wish.

Mr. Harris: Yes, I would like to voir dire the witness.

The Court: All right.

Mr. Harris: What type of unit was this motion picture made with, Mr. Weiner?

The Witness: The particular unit that is demonstrated in front of you (indicating).

Q. (By Mr. Lyon): You are pointing to Plaintiff's Exhibit 2 for identification?

A. That is correct?

Mr. Harris: Are you an engineer?

The Witness: No, sir, I am not.

Mr. Harris: Are you a doctor of medicine?

The Witness: No, sir, I am not.

Mr. Harris: Are you familiar with mechanics and mechanical movements?

The Witness: Let's say in common lay language and terminology, yes.

Mr. Harris: You are simply a layman?

The Witness: That is correct.

Mr. Harris: Are you familiar with the detailed mechanism of of this table, Plaintiff's Exhibit 2 for identification?

(Testimony of Jay Weiner.)

The Witness: Familiar for identification? Yes.

Mr. Harris: No. Are you familiar with the [21] mechanism of that table?

The Witness: Yes, sir.

Mr. Harris: To what extent?

The Witness: The means and method by which it moves, the means and methods by which it is constructed for its use and application.

Mr. Harris: Are you familiar with its mechanical movements?

The Witness: Yes, sir.

Mr. Harris: I think, if the court please, we should have this table demonstrated at this time to see how it does move.

The Court: He purports to do that by showing a picture of it.

Isn't that what you want to do through this offered Exhibit 3?

Mr. Lyon: I will accept the challenge of the defendant, or the defendant's counsel and turn on Plaintiff's Exhibit 2.

The Court: Can you move it out a little so I can see it from here? Just move it back toward the podium a little way.

(Mr. Lyon complies.)

The Court: Thank you.

Mr. Harris: Mr. Weiner, can you see the operation of this mechanism, Exhibit 2 for identification?

The Witness: The operation of it? [22]

(Testimony of Jay Weiner.)

Mr. Harris: Can you see the operation from where you sit there?

The Witness: Yes, sir.

Mr. Harris: You notice, do you not, that the—what do you call this thing I am pointing to here (indicating)?

The Witness: I refer to it as a transducer.

Mr. Harris: Is that a pad (indicating)?

The Witness: That would be a very loose term for it, would be a pad or paddle.

Mr. Harris: It is a pad or paddle which is adapted to engage a user, is it not?

The Court: By “user” you mean the person who is——

Mr. Harris: The person who is reclining on the structure.

The Court: Do you understand the question?

The Witness: Yes, but I am not sure I can say it is designed to—how did you make your statement?

The Court: He said to engage.

Mr. Harris: I asked, is it designed to engage——

The Witness: I am not sure I can say it is designed to engage the user.

Mr. Harris: When a user lies on this table, Exhibit 2 for identification, this pad or paddle we are referring to—(indicating)——

The Witness: That contacts. [23]

Mr. Harris:——it contacts the user, does it not?

The Witness: But I am not certain under your definition it necessarily engages the user.

(Testimony of Jay Weiner.)

Mr. Harris: I wouldn't quibble with the witness on terms.

What is the extent of movement of this pad or paddle which I am pointing to in Exhibit 2?

The Witness: Three-quarters of an inch.

Mr. Harris: On both sides of the vertical?

The Witness: No, sir, that is total.

Mr. Harris: The total movement?

The Witness: Total movement, to the best of my knowledge.

Mr. Harris: It moves from half that distance on one side of the vertical to half that distance on the other side of the vertical, does it not?

The Witness: Yes, to the best of my knowledge, it is a three-quarter inch movement.

Mr. Harris: Have you ever seen the internal mechanism of a device like Exhibit 2, the operating mechanism?

The Witness: I have seen the internal devices of these particular machines, but I haven't seen like in any other equipment.

Mr. Harris: Have you ever seen the internal mechanism of this particular machine (indicating)?

The Witness: Yes, sir.

Mr. Harris: Would you describe that mechanism, please?

The Witness: This will be a little difficult but I can. It operates off a small motor. I believe it is a 12-horsepower motor. It operates in a cam, so that the arm on here (indicating) works off center on the cam to increase—so that the major

(Testimony of Jay Weiner.)

part of the stroke on the arm is above the surface of the table.

Mr. Harris: If the court please, based upon this voir dire examination we object to any showing of any motion picture of this table on the ground that this table obviously does not come within Claim 1 of the Stauffer patent in suit, because here we have a motion on both sides of the vertical and the patent in suit—not once but three times in different terms—points out that the motion is all on one side of the vertical.

Mr. Lyon: Where does it say any such thing in Claim 1?

The Court: Do you want to say something, Mr. Lyon?

Mr. Lyon: I just asked counsel where any such limitation appears in Claim 1.

Claim 1 doesn't have any limitation as to the movement, except that it will be tiltingly oscillated. Claim 2 is limited to a certain part.

It is elementary patent law, where you have one claim that has one meaning and another claim that has a different [25] meaning, you will not read the second one as meaning the same thing as the first.

Mr. Harris: We have the further objection, the court please, that is, there has been no foundation laid to show any motion picture of this machine, because there is no evidence in this case this particular table, Exhibit 2 for identification, is built in accordance with or under the patent in suit. It is

(Testimony of Jay Weiner.)

simply something that plaintiff's counsel says it is, but that is not evidence.

Mr. Lyon: I was admitting, Mr. Harris, I was proceeding somewhat out of order and I probably should first put Mr. Stauffer on and have him testify this table was made in accordance with his understanding of his patent. He will so testify. But I wanted to get rid of the motion picture.

The Court: In the interest of expedition we allow a variation in the order of proof, so we will admit Exhibit 3 subject to a motion to strike if it is not connected up. We will hear the evidence and see the picture.

(The object previously marked Plaintiff's Exhibit No. 3 for identification was received in evidence.)

Mr. Harris: We shall rely upon your Honor's judgment to separate the wheat from the chaff in the case. We will make such a motion later.

Mr. Lyon: I offer Plaintiff's Exhibit 3 subject to the motion to strike. [26]

The Court: It is received subject to the motion.

Q. (By Mr. Lyon): Will you now show the movie, please, Mr. Weiner? A. Yes, sir.

Mr. Lyon: It will take maybe five minutes to set up. Do you want to take a recess at this time, sir?

The Court: It will take five minutes to set it up?

Q. (By Mr. Lyon): Will it?

A. I imagine so, three to five minutes.

The Court: Let's stay in session but don't feel

(Testimony of Jay Weiner.)

that you are rushed. Whenever I take a recess some lawyer comes in and the recess gets extended.

Mr. Lyon: I think if you set up your screen here and project from—the projector can go on the clerk's bench if you like.

I might add, your Honor, I am informed this motion picture you will see, a portion of it is in X-ray, and is the third motion picture in history made in X-ray.

Mr. Harris: I wonder, if the court please, if I might ask one more question of the witness while he is wandering around, and that is, did he make this motion picture himself personally?

Mr. Lyon: No, he did not.

The Witness: You are asking——

Mr. Lyon: It was made under his supervision.

Mr. Harris: Pardon me. Would you answer the question?

The Witness: No, I didn't make it. It was made under my supervision by two—they will be identified on the screen.

The Court: Is it true, Mr. Lyon, the life of a patent is 17 years?

Mr. Lyon: Generally speaking that is quite true. It is possible to get a patent extended either by Act of Congress or if the patentee can show that due to World War II or the Korean war he was prevented from commercializing the same, and that he himself was in the service of his country during that time, the Commissioner has authority to extend the life of the patent, I believe, by twice the number

(Testimony of Jay Weiner.)

of days he was in the service. I tried one patent which was so extended here in this court.

The Court: Unless this patent has been so extended it has less than two years to live.

Mr. Lyon: Correct. It has not been extended. Design patent is a somewhat different situation. Design patents are issued for 3½, 7 and 14 years, depending on how much of a fee the patentee wants to pay.

The Court: This one has only 18 months of life, if the date on your soft copy here is correct.

Mr. Lyon: This patent will expire May 6, 1958.

The Witness: Now can I have the lights out, please? [28]

I am having trouble with the sound pickup on this. Have you pulled that over for any reason over there, the sound?

Wait until the sound comes in. Is it coming in now?

Mr. Lyon: It is making a noise.

Mr. Harris: The sound is hearsay, if the court please. I want the sound turned off.

The Court: What makes it hearsay? It is part of the physical exhibit.

Mr. Harris: Very well, your Honor.

The Court: The sound will be treated as argument, not as evidence. The picture is evidence of what it shows.

The Witness: If I might have a light here, your Honor. I don't know what is wrong here with the sound pickup. We ran this at one of the hospitals

(Testimony of Jay Weiner.)

this morning and it was all right. If you will bear with me a minute.

The Court: Yes.

Mr. Harris: Pardon me, if the court please.

Who made the sound track?

The Witness: The men that are on the film.

Mr. Harris: The men's names on the film?

The Witness: That is correct.

Mr. Harris: Are they going to be produced here for cross examination?

Mr. Lyon: They can be, if necessary.

Mr. Harris: It is all hearsay. [29]

The Court: I take it they are merely giving a commentary in order to explain the physical objects depicted in the picture.

Mr. Harris: I don't doubt that, your Honor, but it is hearsay.

The Court: So is the argument of counsel. We will treat this the same way.

Mr. Lyon: Demonstrations in court always go haywire.

The Witness: It never fails, does it?

Mr. Lyon: There is the sound.

The Witness: Yes, but it isn't coming off my film. The film is over the sound pickup here. I have another tube here.

Mr. Lyon: It only takes 12 minutes after we get it going.

It is stipulated by and by and between the parties that the court reporter shall provide the original transcript for the judge's use, the cost of the same

(Testimony of Jay Weiner.)

to be taxed against the losing party. So stipulated?

Mr. Harris: I am afraid that won't be satisfactory with the reporter. I think we ought to stipulate that each party pay half the cost and then the winning party's cost shall be taxed as costs in the case.

The Court: I understand that is what Mr. Lyon had in mind. [30]

Mr. Lyon: Let's get the lights out. All we are going to be able to show is the movie part——

(Thereupon, Exhibit No. 3 was run through a movie projector with the sound track working through only a portion of the Exhibit 3 in words as follows:)

A Voice: “* * * the flexion of the cervical vertebrae, arching of one vertebra upon another.

“The movements of the arrow coincide with the action of the transducer. The transducer beneath the shoulders also tilts the upper thorax, extends the diameter of the rib cage superally, and induces elevation of the clavicle.

“In addition, a lateral movement of the shoulder produces a rhythmic stretching of the pectoral muscles.

“Movement of the clavicle upon the sternum can be seen and the rotation of the upper rib cage observed. In the lower portion of the rib cage a certain amount of rotation is also observed.

“There movements of the rib cage are detected by the sternum mastoid, the intercostals and the scapular muscles, producing elevation and lateral

(Testimony of Jay Weiner.)

rotation of the thoracic cage. The momentum induced within the body also assists in these motions.

“The lower ribs are marked to show the motions of the thorax in relation to the rest of the ilium, which has also been marked.

“The movements of the abdominal wall are seen. The abdominal contents ultimately move against the diaphragm, exerting a pumping action within the thorax. A superimposed rhythmic motion is thus transmitted to the heart and its associated structures.

“And even greater movement of the abdomen is observed when the transducer is placed beneath the hips. A rotatory movement of the pelvis through an arc tends to stretch the longitudinal vertebral ligaments. A weight placed across the hips produces permanent fixation of the thorax against the transducer and results in a more pronounced lifting effect. A greater excursion of the abdominal musculature and a greater attraction upon the pelvic ligaments and gluteal musculature occurs.

“In this animation, with the transducer placed beneath the shoulders as before, the changes in diameter of the chest produced by rotation of the costal vertebral articulation are demonstrated.

“The movement of the barium filled esophagus also follows the rhythmic motion of the transducer.

“When the subject sets directly upon the transducer a considerably greater body motion is induced. This position produces an alternating flex-

(Testimony of Jay Weiner.)

ion and extension of the muscle sacral angles and the lateral body wall.

“Posteriorly the markings over the spinous processes of the vertebrae and ilia crest indicates the wide degree of motion occurring in this position. This motion tends to stretch the anterior and posterior longitudinal ligaments and the sacro-iliae and sacro-lumbar ligaments as well.

“The plus marker has been placed over the lumbo-sacral articulation. The wide range of motion in this position between the lumbar vertebrae can be readily seen. The erector spinalis supra muscles are brought forcefully into play in this position. A metal marker is used as a reference point to determine excursions of the lumbar spine.

“The widening and narrowing of the spaces between the vertebrae in this X-ray motion picture demonstrates the repeated mild traction and release which is being produced.

“In this final position the transducer is placed longitudinally beneath the back. This imparts a vigorous motion to the abdomen. In addition, [33] this lateral motion produces a rhythmic stretch of the lateral trunk and thigh ligaments and muscles.

“The rhythmic motions induced have been demonstrated to exert an exercise effect, together with regular measured gentle traction, alternated with periods of relaxation.”

The Witness: Thank you for your patience, your Honor. I can wind this back while they are talking.

(Testimony of Jay Weiner.)

Do you want this as a part of your evidence?

The Court: Yes.

Q. (By Mr. Lyon): I think, Mr. Weiner, if you will resume the stand we can rewind that and put it back in its case during the afternoon recess.

A. All right.

Q. Will you explain in general what your duties are with the Stauffer System?

A. Yes, sir. A while back, approximately a year and a half ago, Mr. Stauffer had decided to present his equipment for use in the medical profession.

Since I had had some experience in marketing and research and so on in the past, I was given the position of doing the research work and development with doctors, with hospitals, with clinics, setting up research background material in the use of this equipment therapeutically. [34]

Q. When you say "this equipment" what are you referring to?

A. I am referring to the equipment illustrated in the film and the mechanical device here on the floor (indicating).

Q. Plaintiff's Exhibit 2 for identification?

A. That is correct.

Q. This Stauffer Home Unit (indicating)?

A. Yes.

Q. Just what have you been able to establish in the way of medical use for experimentation with the Stauffer table?

Mr. Harris: If the court please, that is objected

(Testimony of Jay Weiner.)

to on the ground no foundation has been laid for this witness, a lay witness, to testify to such matters.

Mr. Lyon: He testified that is what his business is.

The Court: It is not evidence of the therapeutic benefits, is it?

Mr. Harris: I am afraid that is what he is going to say. That is why I objected to the question.

The Court: The court would rather like to hear it as general orientation matter. But if it comes down to getting just how much a muscle is stretched, we will have to have expert testimony. He may answer.

The Witness: Will you restate the question again, Mr. [35] Lyon?

Q. (By Mr. Lyon): The question was, just what has been undertaken in connection with the use or experimentation with a Stauffer table by the medical profession?

A. Well, I first tried to establish that the operation of this particular device of the Stauffers, this mechanical process, did produce exercise in the human body.

I solicited the help of a Dr. Lawrence Morehouse, a P.H.D. in physiology and instructor in physical education and rehabilitation at UCLA.

He with four other men—two other physiologists, registered physical therapist and a master in physiology—did the work to determine whether this actually had the equivalent of physical exercise in

(Testimony of Jay Weiner.)

its value. His report, I believe, you have available.

The Court: He can't tell what is in the report.

The Witness: No, I am not trying to make any diagnosis. Secondly, I presented the equipment to Dr. John Aldes at Cedars of Lebanon Hospital in physical rehabilitation.

Dr. Aldes has been using the equipment for seven months there, working on osteo-arthritis cases and low back cases and cervical problems and Berger's disease. He is about due to publish his report. He tells me it is quite a favorable report at present.

Mr. Harris: The court please, this is all hearsay. It [36] isn't what he knows about these facts. He is just repeating hearsay.

Mr. Lyon: The last part of the answer may be stricken?

The Court: What the results of the doctor's work has been, if it is important, we will have to hear from the doctor himself.

I think very little of this, Mr. Lyon,—

Mr. Lyon: This shouldn't take very long, your Honor, and I will be finished with this witness. He has two or three more projects, I believe, to testify about.

The Court: I think he may testify about them, just as long as he doesn't invade the expert field or relate hearsay. We are receiving it as general orientation matter.

Mr. Lyon: Yes.

The Witness: The balance of the projects that I am supervising, your Honor, or trying to place,

(Testimony of Jay Weiner.)

one of them is at White Memorial Hospital in the study of the use of this type of motion on the reducing of blood sugars in diabetic subjects. That work is being done by Dr. Pote.

I have another project at the present time at Bellevue Hospital in New York. Dr. Albert Haas is doing work on the study of the influence of this type of motion, this particular motion, on emphysema.

I have another project being done at the Sister Kenney Foundation on the use of this type of motion—Dr. Lingren, [37] and again Dr. Raymond—on the influence of this type of motion on rehabilitation in post-polio cases.

I might add there is one other project at Cedars of Lebanon Hospital. They are working on multiple sclerosis and have been for several months.

To the best of my knowledge—oh, I have one other project just starting now. Joslyn Clinic in Boston have agreed to do additional research work on the use of this particular motion on reducing of blood sugars in diabetics.

Q. (By Mr. Lyon): You several times in your conversation stated that these various investigations are concerning the use of “this motion.” By “this motion” I take it you mean the motion of Plaintiff’s Exhibit 2 and the motion that is shown in the film, Plaintiff’s Exhibit 3.

A. That is correct.

Mr. Lyon: You may cross examine.

(Testimony of Jay Weiner.)

Mr. Harris: No cross examination, the court please.

(Witness excused.)

Mr. Harris: The court please, the last witness has asked me if he may take his projector. I am afraid if he rewinds the thing here now it would bother our hearing the witness testify. Whatever your Honor cares to do, though.

The Court: Can't he take it out into one of our anterooms?

Mr. Weiner: Yes, I can, I certainly can. [38]

The Court: Go through that door and through the next one (indicating) and my secretary will show you where you can work.

Mr. Weiner: Thank you.

The Court: The bailiff will help you carry it out.

BERNARD H. STAUFFER

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Please state your name.

The Witness: Bernard H. Stauffer.

Direct Examination

Q. (By Mr. Lyon): Mr. Stauffer, you are the Bernard H. Stauffer who is patentee of Letters Patent No. 2,240,679, the patent in suit here, are you?

A. Yes, sir, I am.

Q. You are the plaintiff in this case?

A. Yes, sir.

(Testimony of Bernard H. Stauffer.)

Q. I have laid before you a flat copy of the patent in suit. I will ask you to explain to the court—not going completely through the specification—just briefly and making a record for the Court of Appeals, as to what is shown in this patent, in the specification thereof.

A. It is a motor with a reduction gear—— [39]

Q. The motor is No. 50 in the patent?

A. Motor No. 50, with a reduction gear in a belt combination extending into a large pulley, which has an eccentric.

Q. The pulley is No. 48, is it not? I wish you would give the numbers as you go along.

The Court: I understand he is using Figure 6?

The Witness: Figure 2, your Honor.

The Court: Figure 2. I was trying to follow you on Figure 6. Perhaps that is where I was getting into difficulty.

The Witness: I will use Figure 6. I think it might be easier to follow.

The Court: All right. And refer to each number where you are telling us about some member.

The Witness: Yes, sir. The gear reduction is affected by the motor pulley with the belt 52 onto the large pulley, of which there is a shaft running through the center which is No. 42.

On shaft 42 is an eccentric, eccentric 38.

Q. (By Mr. Lyon): Eccentric what?

A. 38. That is coupled with the pinion 30, which drives a rod 28, which is attached to the perpendicular membrane 20.

(Testimony of Bernard H. Stauffer.)

20 is anchored at the base of 21, which is a bearing [40] permitting the upright unit 20 to go back and forth through an arc.

At the top of 20 is a paddle or a platform 18, which carries that portion of the body that is being activated while the patient is on the unit or the table.

Q. What is the device that supports the major portion of the body of the patient?

A. The device that supports the major portion of the body is the couch. And as this applicator extends up through the slot in the couch a part of the weight of the body is supported on the movable platform 18.

Q. With the portion of the body supported on the couch, and a portion of the body, shall we say, the buttocks, being supported on the pad 18, when you reciprocate that arm 20, carrying the pad through the arc indicated in your patent, what happens.

Mr. Harris: The court please, there is no foundation for that. We object to it on that ground. This witness doesn't know anything about what happened.

Mr. Lyon: He is the inventor.

The Court: Overruled.

The Witness: The applicator that is carrying the weight induces a traction effect on the part of the body that is stationary. The weight of the body carried by the applicator causes a stretching effect

(Testimony of Bernard H. Stauffer.)

between those areas of the body [41] that are stationary, carried by the couch.

And it is between this action and this weight of the body, carried on the couch, that you get the stretching effect or the traction in the various muscle areas.

Q. (By Mr. Lyon): I call your attention, Mr. Stauffer, to the opening paragraphs of your patent specification, wherein it is stated:

“The machine of this invention relates to mechanical means to soothe, relax, and strengthen certain of the muscular areas of the human body for the purpose of alleviating pain due to nerve stricture arising from maladjustment of certain of the vertebrae * * *”

And so forth.

I am looking someplace where it mentions pelvic dip. I don't seem to be able to find it. I can't seem to lay my hand on it right now.

Just tell me, if you can, what is pelvic dip.

A. Pelvic dip in our terminology is where the pelvic structure has rolled forward in front, causing a swayback and an abdominal bulge, so to speak.

The Clerk: Plaintiff's Exhibit 4 for identification.

(The object referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Lyon): I hand you what has been identified [42] as Plaintiff's Exhibit 4 and ask you if you can describe to me what it is.

A. This is a mechanical illustration of the effect

(Testimony of Bernard H. Stauffer.)

of that motion on the human body. We have merely taken the mechanical applicator and assuming you place it under the buttocks at this point (indicating) it rocks, and it rocks it this way, it rocks it up in the front and down in the back (indicating). There is a constant rocking motion.

Assuming that the body was out of alignment, like that (indicating), which is a common ailment with the average human because, as the pelvis rolls forward it throws the weight in the back of the abdominal wall, and throws the weight off center in the knee and that is what we call the dowager hump (indicating).

Q. Now, Mr. Stauffer, this device you have, Plaintiff's Exhibit 4 for identification, has on it, does it not, various units pivoted together, intended to represent portions of a human frame, is that correct?

A. That is right. The ankle, the knee, the femur bone, the spinal column and the base of the neck area (indicating).

Q. Counting from the bottom, we have first the foot. A. Yes.

Q. Then we have—what is next?

A. Well, the next major point of misalignment comes at the knee. [43]

Q. I am not talking—I want to give these various elements of this device a name.

The Court: Has that device been given an exhibit number?

(Testimony of Bernard H. Stauffer.)

Mr. Lyon: Exhibit 4, your Honor. These two are alike (indicating).

Mr. Harris: We have never seen this exhibit, the court please.

The Court: Come up and get a good look now.

Mr. Lyon: You can use mine.

Mr. Harris: I will simply look over counsel's shoulder as he goes through that.

The Witness: This is the foot (indicating).

Q. (By Mr. Lyon): The bottommost member is the foot?

A. Yes. Then the shinbone and the calf bone and then the thigh (indicating).

Q. No. 3 from the bottom is the thigh.

A. Thigh.

Q. The next——

A. Would be the pelvic structure (indicating).

Q. Stop with No. 4, the pelvic structure. I have taken the pelvic structure and tipped it in the clockwise direction, as it seems to want to go in Exhibit 4. Is that the condition you refer to as pelvic dip?

A. That is correct. That is our terminology for pelvic dip or pelvic tip, whichever you want.

Q. I take No. 4 unit from the bottom in Exhibit 4, the pelvis, and I move it as far to the left, or counter-clockwise, as it will go (indicating).

Explain to me what is going on when I do that.

A. When you have that you are overcoming that pelvic tip which automatically throws the weight of the abdominal area out, like this (indicating), and

(Testimony of Bernard H. Stauffer.)

lifts the rib cage. It throws the sway out of the back and it throws a better alignment in the neck area (indicating). It throws the weight in a better alignment area from the ankle through the knee, through the femur bone and through in behind the ear, which gives us good posture (indicating). That is the basic motion of the unit that acquires that.

Q. You are partner in a system known as the Stauffer System? A. Yes.

Q. Do you care to say whether there is one basic thought that underlies the treatment known as the Stauffer System?

Mr. Harris: The court please, that is immaterial to any issue in this case.

The Court: I think we have had about all of that that we can have. After all, we are not trying the human body here, but, rather, the particular structure which has been patented. [45]

Mr. Lyon: That is right. What I wanted to point out was that this forwarding, this raising of the pelvis into its correct position by this particular motion is the basic idea which both the plaintiff and the defendant are using in their treatment of the human body.

Mr. Harris: The court please, this witness' opinion on that subject wouldn't be qualified. There is no foundation laid for that.

Mr. Lyon: I will strike the question.

Q. (By Mr. Lyon): I believe you said you are a partner in this Stauffer System? A. Yes.

(Testimony of Bernard H. Stauffer.)

Q. Which consists of yourself and your sister, a partnership? A. That is correct.

Q. How long has that partnership been existence? A. We first started in 1938.

Q. When you made this—I notice your patent application was filed August 1, 1938. What steps, if any, after you made the invention of the patent in suit did you take toward commercializing the same?

A. Well, in November of 1938 we opened up an office to display our equipment for sale, and it later become identified as a reducting system.

Q. Will you go on and give me briefly the history of [46] the Stauffer System, from its inception up to the present time?

A. Well, we started very modestly at Third and Western here in Los Angeles. It was primarily on a basis of stepped up circulation, together with better postural, or what we term body alignment, I guess it would be——

Q. Mr. Stauffer, tell me the development of the business, did you start manufacturing and selling these tables or did you start opening salons, or what did you do?

A. We manufactured enough of the equipment to start several of our own salons, and then we manufactured more equipment to put in and establish other salons that were permitted to use the registered trade name and give the Stauffer System treatments.

Now, it expanded very rapidly at first. We had quite a number of salons by the time World War II

(Testimony of Bernard H. Stauffer.)

came along, and we expanded up until 1946. We had approximately 200 salons across the nation.

In the past 20 years—or, 19 years this month, we have given treatments to over 5,000,000 women in all 48 states, and it has become a big business. Many, many millions of treatments have been given in these salons.

Q. At my direction did your organization cause an examination of its records to be made, to determine the number of units, portable posture-rest units, such as Plaintiff's [47] Exhibit 2 for identification, and the salon type of Stauffer salon tables and the Rith-Matic tables, how many have been made and distributed?

A. Yes, we did. We instructed our manager, Mr. Teasdale, to do that.

Q. I show you a document dated November 9th and ask you if you can identify that.

A. Yes, that is the report given by Mr. Teasdale as the amount of portable home units we manufactured, together with the Stauffer salon tables and the Rith-Matic salon tables at the present time.

Q. How many of the portable units have you manufactured?

A. We have manufactured and sold—

Mr. Harris: The court please, the witness is testifying from this report. It is hearsay so far as he is concerned. We object to that question on that ground.

The Court: Sustained.

Mr. Lyon: Your Honor, I believe there is a rule

(Testimony of Bernard H. Stauffer.)

in this jurisdiction—and it is a California rule of law—that a witness can testify from a summary which is prepared under his jurisdiction.

The Court: Oh, yes, of course he can. But there is no foundation for that here.

I sustained it, without giving an elaboration of why. [48] I felt the foundation was grossly wanting.

Mr. Lyon: Well, I will lay the foundation.

Q. (By Mr. Lyon): Mr. Stauffer, in order to determine the number of units which have been sold by your partnership, would it be necessary to examine a long and voluminous account?

A. Yes, it would take quite an extensive one.

Q. Have you caused anyone in your organization to make such an examination and present you with a summary?

A. I have requested Mr. Teasdale, our general manager, to make that summary and go through the books and determine the amount that we have sold and the amount that we have manufactured.

Q. And the paper you have in your hand is his report? A. Yes, it is.

Q. But it was addressed to me instead of you, is that correct? A. That is correct.

Mr. Lyon: With that foundation, I again offer the letter—

The Court: Isn't it necessary that the summary be of things in evidence?

We use summaries repeatedly in these courts, but generally they are summaries of the evidence. They

(Testimony of Bernard H. Stauffer.)

are the pulling together or correlating of many figures or many documents. [49]

Mr. Lyon: All right.

The Court: And this is calling for a recitation of hearsay on something as to which it would be impossible to look for in this record, for the material from which to base cross examination.

Q. (By Mr. Lyon): Mr. Stauffer, will you describe the Stauffer salon tables you have manufactured and sold by Stauffer Systems?

A. We have a series of four different tables that comprise the Stauffer system of treatments. These four different tables have six different positions.

Position No. 1 is on the units that have the single paddle oscillating back and forth.

Position No. 1, we put the buttocks on the movable platform. Position No. 2, we put the shoulders on the platform.

Q. In that regard, I call your attention to a document which I am handing you. Describe that document. Tell me what it is and what it shows.

A. This shows a Stauffer System No. 1 table with the patron on the movable platform in the No. 1 position, or moving the pelvic area. This is the No. 1 position (indicating).

Q. Now, with regard to the table itself, will you describe what is shown there?

A. The table is a couch-like structure with a single [50] movable platform extending up through a slot, oscillating back and forth, in which part of the

(Testimony of Bernard H. Stauffer.)

body weight is carried by the table itself and a part of the body is carried by the movable platform.

Mr. Lyon: I will ask the clerk to mark this as Plaintiff's exhibit next in order.

The Clerk: Plaintiff's 5.

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Lyon): This illustrates the first position in the Stauffer System, is that correct?

A. That is correct.

Q. And it illustrates Table No. 1, is that correct? A. Yes, sir.

Q. Is it your opinion as a patentee and inventor of the patent in suit that Table No. 1 embodies the invention of your patent? A. Yes.

Mr. Harris: If the court please, that is the opinion of the witness. It is the province of the court to determine that and not this witness.

Mr. Lyon: I certainly think the inventor is qualified to testify as to what he thinks his invention is.

Mr. Harris: That is exactly the thing that is called upon the court to decide. [51]

The Court: The court must decide, but it is more or less like these matters of title. Any owner can testify that he is the owner or any claimed owner testifies to that and he is also allowed to testify as to the value of his property. But it doesn't mean that the court must accept his appraisal of those particular situations.

I think the same is true regarding inventors and the patents which issue upon their inventions.

(Testimony of Bernard H. Stauffer.)

Mr. Harris: There is a wide divergence of the rulings of the District Court on that very question. The weight of authority is that the witness shall not be asked questions calling upon him to interpret his own patent. That is the province of the court and not the witness.

Mr. Lyon: I disagree thoroughly. I certainly never failed to secure a ruling that an inventor can testify he thinks a certain device embodies his invention.

The Court: I think that is generally allowed.

Mr. Harris: I will be glad to furnish authorities to the court on that objection, if the court desires them.

The Court: The objection is overruled.

The Witness: May I proceed, sir?

The Court: Yes.

The Witness: Would you state that again, so I will have it clearly?

Q. (By Mr. Lyon): I asked whether, in your opinion, [52] Table No. 1 embodies the invention of the patent in suit. A. Yes, it does.

Mr. Lyon: The document, Plaintiff's Exhibit 5 just identified by the witness, is offered.

Q. (By Mr. Lyon): I show you another document—

Mr. Harris: The court please, I object to this document. There is no foundation laid this has anything to do with the patent in suit, except this witness' opinion. We object to it on that ground. It is incompetent and no foundation has been laid.

(Testimony of Bernard H. Stauffer.)

The Court: What is the document, Mr. Lyon?

Overruled.

(The document previously marked Plaintiff's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. Lyon): I show you another document and ask you to describe that.

A. This is Position No. 2 in the Stauffer System, and it is where the movable platform is now placed under the diaphragm or the chest area and it is—the rest of the body is, the weight is carried in another area of the couch, thus permitting a stretching action between that part of the body carried on the couch and the part of the body that is carried on the movable platform.

Q. Does that illustrate a table which, in your opinion, embodies the invention of the patent in suit? [53]

A. Yes, it does.

Mr. Harris: May I have the same objection to that last question, the court please?

The Court: You may state it now.

Mr. Harris: The objection simply is that it is calling upon the witness for his opinion as to whether something embodies the invention of his patent. I wish to have this same objection go to any question of that type.

The Court: Do you want it understood that that objection goes to all this line of testimony?

Mr. Harris: Yes, your Honor, if you please.

The Court: The court understanding that inven-

(Testimony of Bernard H. Stauffer.)

tors may give such testimony overrules your objection.

Mr. Harris: Certainly, I understand. I just wanted my objection for the record, that is all.

The Clerk: Plaintiff's Exhibit 6 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Mr. Lyon: The document just identified is offered in evidence as Plaintiff's Exhibit 6.

Mr. Harris: The court please, that is objected to, furthermore, on the ground this witness has not identified what table is shown in that exhibit.

The Court: I think that is good, Mr. Lyon.

Mr. Lyon: I will ask him that. [54]

Q. (By Mr. Lyon): What table is shown in Plaintiff's Exhibit 6?

A. This is the No. 1 Stauffer System table with the one movable platform.

Q. The same table that is in Exhibit 5, isn't it?

A. Yes, sir, the same table.

Mr. Lyon: I reoffer Plaintiff's Exhibit 6.

The Court: Received.

(The document previously marked Plaintiff's Exhibit No. 6 for identification was received in evidence.)

Q. (By Mr. Lyon): Mr. Stauffer, I call your attention to what has been identified as Plaintiff's Exhibit 2. I wish you would come down here and describe just what it is, just the same way as you described how your patent worked.

(Testimony of Bernard H. Stauffer.)

A. As the couch, in this case it is a portable, carries the weight of a body extended beyond the movable platform, and as this platform oscillates back and forth it has the mechanics of throwing the pelvis down on the back and up on the front, permitting the top half of the body to be strongly activated towards the head and the bottom more activated toward the legs and the feet (indicating).

Q. Well, concerning yourself more with the structure of the device itself, is that a muscle relaxing machine?

A. That is what—yes, it is a muscle relaxing machine. [55]

Q. Has it a couch part?

A. It has a couch part; a slot for the movable platform.

Q. And there is a slot in the couch part—

A. Yes.

Q. —opening between the two portions of the couch.

And is there a vertically directed oscillatable support for a flat rectangular applicator in that device? A. Yes, there is.

Q. Will you point it out to the court?

A. This is the applicator (indicating), flat rectangular, and these segments here are the couch structure (indicating).

Q. And there is a shaft running up there supporting that? A. Movable platform.

Q. Movable platform. Does that flat rectangular applicator move through an arc or tilt?

(Testimony of Bernard H. Stauffer.)

A. It moves through an arc. As the arc ascends it picks the weight up, permitting the top half of the body to be worked slightly like a hinge.

Q. That applicator oscillates actually the length of the couch?

Mr. Harris: The court please, these questions are very leading. Counsel is reading from the claims of the patent in [56] suit in a leading fashion, to have the witness answer yes. I think it is a leading question, and I think it is objectionable on that ground.

The Court: Sustained.

Q. (By Mr. Lyon): Tell me what happens to the applicator when you turn on the electricity.

A. The applicator moves through this arc, back and forth (indicating).

Q. Back and forth. Back and forth in any special direction? A. It runs horizontal.

Q. Well, horizontally east and west or north and south? What direction?

A. Well, I term the motion of that arc, when the body is placed on it, the motion is from the head to the foot.

Q. In other words, it is longitudinal?

A. That is correct.

Q. Not transverse of the machine?

A. Oh, no.

Q. That is the way the machine is set up here now. Can it be converted to transverse motion?

A. Yes, it can.

Q. Will you illustrate that to the court, please?

(Testimony of Bernard H. Stauffer.)

A. By changing the direction of the couch you automatically change the direction of the motion.

Q. What you did was take the center section around and turn it around 90 degrees?

A. That is right.

Q. And put it back together again?

A. Yes.

Q. What is this device, Plaintiff's Exhibit 2 for identification, identified as in your business? Has it got a name?

A. This is called the posture-rest (indicating).

Q. Sometimes is it ever called the home unit?

A. The home unit. The home unit or the Stauffer home plan is the plan for which you use the posture-rest.

Q. Now, what is identified in your record as a Rith-Matic salon table?

A. A Rith-Matic salon table is one we sold—

Q. You can resume the stand.

A. All right. A Rith-Matic table is one that we sold outright. It was a salon table that was sold outright to anyone operating a salon, so that if they choose to operate it without a franchise they wouldn't have any access to the registered trade name "Stauffer System". In other words, we sold them a Rith-Matic unit.

Q. As a structure, how did it compare with your Stauffer franchised tables?

A. Well, there was virtually no difference. [58]

Q. And what was a Stauffer salon table. Describe it for the record.

(Testimony of Bernard H. Stauffer.)

Mr. Harris: I object, if the court please. This is all not the best evidence. The tables themselves are the best evidence, the drawings of the tables are the best evidence. To have this witness merely describe in a general way what these tables are is of no consequence in this case.

Mr. Lyon: I am asking him for a fact. He certainly knows the facts. We have pictures of them.

The Court: He may answer.

The Witness: Will you repeat the question, please?

Q. (By Mr. Lyon): I said describe a Stauffer salon table.

A. Our salon table is a large version of the posture-rest, which is constructed for commercial use.

It is built to run for long hours, which our salons operate, 14 hours a day. It is built very rugged, very heavy. But this basic principle is incorporated in it (indicating).

Q. They have a couch and so on?

A. They are identical.

Q. Describe the elements of a salon table.

A. A salon table is a couch with a movable platform extending up through a slot, in which the motion of the movable platform carries part of the weight of the body and the couch carries additional weight of the body, and the motion [59] of the platform works against that stationary part of the body.

(Testimony of Bernard H. Stauffer.)

The Court: What are you trying to prove, Mr. Lyon, by this testimony?

Mr. Lyon: You objected to my putting in an accounting of how many tables we had before I identified the tables. Now I have identified the tables.

The Court: I see what you are undertaking to do.

Q. (By Mr. Lyon): Having described a Stauffer salon table and a Rith-Matic table and a posture-rest table, you having testified, I believe, that in your opinion all three of them are manufactured in accordance with your patent, can you now give me a figure as to sales and distribution of all three of those tables?

Mr. Harris: Same objection, if the court please; no foundation laid, not the best evidence.

The Court: Sustained. Sustained on the basis there is no foundation. From what does he get the information?

Mr. Lyon: We have gone over that, your Honor. We got it from his comptroller. We asked him to run the long account.

The Court: That should be produced.

Mr. Lyon: What should be produced?

The Court: The account.

Mr. Lyon: I have it—he has it. I asked the witness [60] a while ago if he asked Mr. Teasdale to examine this long account and render a report, and he said yes.

And I asked him if he had the report and he said yes, and you said I had laid no foundation as to

(Testimony of Bernard H. Stauffer.)

what went in the accounting. I did that. I now offer as Plaintiff's exhibit next in order Mr. D. F. Teasdale's letter of November 9th, which embodies the accounting which the witness testified concerning.

The Court: Usually the foundation for that sort of thing consists of inventory or books of account, things of that kind, rather than the witness simply taking a letter from someone who has gone over the books of account.

It doesn't seem to the court to have anything to do with the question of validity, in any event.

Mr. Lyon: It is just a question of proving how many of these devices have been manufactured and sold.

The Court: What difference does that make?

Mr. Lyon: Proving commercial success.

The Court: Commercial success becomes or is of rather secondary importance in a case.

You look at it in a close case and it might shift the balance in such a case.

Mr. Lyon: I believe, your Honor, that goes to the weight, not to the admissibility.

The Court: Yes, but you can't spend a tremendous amount [61] of time on commercial success, particularly until you have established your main case which, of course, is established *prima facie* by the patent and presumption which attends it.

Mr. Lyon: It is still my understanding that it is a California rule, when the proving of a fact would require the examination of a long account and a great number of books, that the court will receive a

(Testimony of Bernard H. Stauffer.)

summary from the person who is in charge of those——

The Court: Where is the person who has made the count?

Mr. Lyon: You want Mr. Teasdale?

The Court: I don't think this man can testify to what that gentleman did.

Mr. Lyon: Except he ordered him to do it, and he is his boss.

The Court: I don't think that legally qualifies him to tell——

Mr. Lyon: I think you are probably right.

Q. (By Mr. Lyon): Mr. Stauffer, in the operation of the Stauffer System have you granted licenses to franchise holders under the patent in suit? A. Yes, we have.

Q. I believe you testified there were several hundred salons now in existence, is that correct, Stauffer Systems?

A. In excess of two hundred forty as of today.

Q. And does each of the franchise holders of those 240 [62] or more franchise holders of the Stauffer System, do they have the license under your patent in suit?

Mr. Harris: The court please, that is a legal conclusion of the witness; it is not the best evidence. The agreements themselves are the best evidence. The witness can't testify as to the legal effect of those contracts.

The Court: Sustained.

(Testimony of Bernard H. Stauffer.)

Q. (By Mr. Lyon): Do the franchise agreements mention the patent in suit?

Mr. Harris: The same objection, if the court please.

The Court: Sustained. I can see where we should have had a pretrial and made you come to agreement on a lot of these things.

Mr. Lyon: This is ridiculous, your Honor. I assure you I know the rules of evidence, but Mr. Harris is himself going to insist on the production of those franchise agreements when every one of them grants a license under the patent in suit, and he knows it.

Mr. Harris: It is not the best evidence to have this witness testify what a written contract says. That is my point, the court please.

The Court: Do you think that the contract will not back him up, so that you have a real point?

Mr. Lyon: He has no real point.

The Court: Or are you objecting simply because you have [63] a technical point?

Mr. Harris: Oh, we will stipulate these contracts don't refer to the patent in suit. I will stipulate to that.

Mr. Lyon: That they do?

Mr. Harris: That they do not. That is all I will stipulate to. But I will be glad to stipulate to that. That was the question, do they or don't they relate to the patent, specify the patent in suit, as I understood it.

The Court: Counsel, the court will undertake

(Testimony of Bernard H. Stauffer.)

generally to provide you two and a half hours a day of court time. Today you are going to have to take two hours, since we have been working here since 9:00 this morning in court.

I think we ought to adjourn now for today, but tomorrow let's start at 1:45 and we will carry through until 4:15.

Mr. Harris: Very well, your Honor.

The Court: The court will recess until tomorrow morning at 9:30.

(Whereupon, at 4:00 o'clock p.m., Tuesday, November 13, 1956, an adjournment was taken to Wednesday, November 14, 1956, at 1:45 o'clock p.m.) [64]

Wednesday, November 14, 1956, 1:45 p.m.

The Court: Are we ready to proceed?

Mr. Harris: Yes, your Honor. The court please, as we indicated yesterday at the end of last week and again on Monday of this week we served on the plaintiff subpoenas duces tecum for the production of things and documents.

I ask at this time to have those produced. Will counsel produce them for us?

Mr. Lyon: I think we will try our case in our order and you try your case in your order, Mr. Harris.

Mr. Harris: We would like to look at them.

The Court: Are you intending to use these on cross examination of the witness?

Mr. Harris: We may use them on cross exam-

ination, and we certainly want to look at them before we come to our case.

The Court: Counsel are not required ordinarily to wait until a witness is on the stand in order to look at the documentation which he subpoenaed. Can't you lodge them with the clerk so they will—

Mr. Lyon: Of course, your Honor, there will be objections to the introduction of some of these on the ground of immateriality.

The Court: Did you make any effort to obtain a view of them by any of the discovery processes of the court? [65]

Mr. Harris: I think not, your Honor, because these questions have only come out since we inspected some of the things at the plaintiff's offices about a month ago.

Mr. Lyon: We had a meeting at the plaintiff's office, I think, as Mr. Harris says, about a month ago. We laid on the table everything they asked us to produce, which we had.

The Court: When is your subpoena returnable?

Mr. Harris: Returnable at the opening of court yesterday.

The Court: To whom was it directed?

Mr. Harris: It was directed to the plaintiff, Mr. B. H. Stauffer, and it was served on his counsel as required by Rule 5.

The Court: Then those things which were called for by that subpoena should be handed to the clerk, who will give them identification numbers, so that counsel may have access to them.

Mr. Harris: Thank you, your Honor.

Mr. Lyon: So the record may be clear, I am handing the clerk what has been represented to me by representatives of the plaintiff to be all of the license agreements or franchise agreements for the Stauffer System from the dates indicated in the subpoena.

I will hand to the court reporter and ask her to copy into the record as if read by me a list of the documents [66] which I am producing.

(The above list mentioned by Mr. Lyon is as follows:)

- “Pearl Trevey, Charleston, West Virginia.
- Thelma Williams, Cincinnati, Ohio.
- Betty Skousen, Albuquerque, New Mexico.
- Walter J. Miller and Katherine K. Miller, Allentown, Pennsylvania.
- Zel Cloder, Allentown, Pennsylvania.
- Sybil Stephens, Altus, Oklahoma.
- Ethel Hatcher, Albany, Georgia.
- Betty D. Nelson, Akron, Ohio.
- Elizabeth Pearce, Oakland, California.
- Dorothy M. Marx and Verna P. Shore, Jacksonville, Florida.
- Mabel Crittenden and Louise Goins, Frankfort, Kentucky.
- Eunice Hall, Houston, Texas.
- James Ferebee and Dorothy O. Ferebee, Houston, Texas.
- Adelia Hammond, Frankfort, Kentucky.
- Rolland N. Little, Fort Wayne, Indiana.
- Mrs. M. K. Zugsmith and Mrs. M. A. Carli, Broward County, Florida.

Bernice Leadley, Jane Woods and Dorothy M. Leigh, Evanston, Illinois.

Lily Swanson and Ebba Pelascini, Eureka, Arcata, Fortuna, Calif.

Louise Bunce, Eureka, Arcata, Fortuna, Calif.

Lydia A. Heinze, Denver, Colorado.

Mrs. Carl Spoon, Durham, North Carolina.

Mary L. Herritage and C. J. Herritage, County of Nueces, not City of Bishop but including City of Alice, Texas.

Thelma Ray Thurmond, Shreveport, Louisiana.

Mary Pepe, Buffalo, New York.

Daisy Hardman, Reading, Pennsylvania.

Hazel Swore, Galveston, Texas.

Carmel E. Cameron, Gainesville, Texas.

J. D. Hurley and Burnette Hurley, Oklahoma City, Oklahoma.

Vera Greenwell and Goldie C. Kaighn, Coden, Utah.

Verna H. Whipple, Ogden, Utah.

Marie Scarnaback, Oak Park, Illinois, Skokie, Illinois.

Ellwood Thisler and Billie Fowler, Duval County, Florida.

Dr. E. R. Burkhart, Riverside and Corona, California.

Ethel H. Weber, Lexington, Kentucky.

Dorothy Maynard, San Jose, California.

Ann B. Sparks, Toledo, Ohio.

Esther L. Jennings, Lima, Ohio.

J. D. Hurley and Burnette Hurley, Oklahoma City, Oklahoma.

Mary Tuhurst Willard, Natchez, Mississippi.

Mildred N. Lakich, Dane, Wisconsin. [68]

Lucienne M. Knaus, Modesto, California.

Mrs. Estelle Semrick Buller, New Orleans, Louisiana.

Pamela Bonura and Mildred K. Marchessau, New Orleans, Louisiana.

Alice C. Webster, New Orleans, Louisiana.

Alice J. Huggins, North Hollywood, California.

Ellen S. Taylor and Margaret H. Woods, Giles County, State of Virginia.

Marie Abbott, Pasadena, California.

Edna Pasteur, Tyler, Texas.

Mrs. W. R. Lamont, Tuscaloosa County, State of Alabama.

Mrs. Ruth D. Perkins and Mrs. Audrey W. grammer, a partnership, Tuscaloosa County, State of Alabama.

Mrs. A. Badger, Vallejo, California.

Mrs. Joe A. Martin, Vernon, Texas.

John Olds and Mayme Olds, Salt Lake City, Utah.

Geneva D. Mullen, Sherman and Dennison, Texas.

Estelle Van Hartogh and A. J. Van Hartogh, Sarasota County and Manatee County Florida.

Mrs. Errol Francis, Gregg County, Texas.

Louise Miller and Edna P. Patterson, Parkersburg, West Virginia.

Lena C. Iole, Pittsburgh, Pennsylvania.

Mr. and Mrs. Lawrence Mundt, Wichita, Kansas. [69]

J. E. McMath, Phoenix, Arizona.

Mrs. Vincent L. Kirchner, Wheeling, West Virginia.

Ella Van Egten and Bert Van Egten, Palm Beach County, Florida.

Mrs. Esther Reichel and Joan Reichel, Peoria, Illinois.

Edithe Owens Smity, Macon, Georgia.

Margaret Treadwell, Macon, Georgia.

Elsie Cross, Los Angeles, California.

Mrs. Leta D. Harrison, San Antonio, Texas.

Nan Lindsay, Salt Lake City, Utah.

Velma Cole and Glen S. Cole, San Diego, California.

Irredell McIntosy, Los Angeles, California.”

I am also handing to the clerk an envelope containing the following:

A document entitled “Stauffer Reducing, Inc. price list September 18, 1956.”

It has attached to it some written matter entitled “Notes” and also a document entitled “Partial List of Home Plan Unit Parts” which is dated October 25, 1956.

I am also handing to the clerk a card entitled “Minimum Price Schedule”.

I am handing to the clerk a metal name tag reading, “Rith-Matic”, a metal name tag reading, “This Apparatus is the Property of Stauffer System”—reading in part, I [70] should say, in each case.

Another metal name tag reading “This Apparatus is the Property of Stauffer System, Inc. and

is Licensed for Use Only as Per Contractual Terms & Conditions”.

Another name tag reading “This Apparatus is Licensed Only for Use in the Stauffer System”, and a final name tag reading “This Apparatus is the Property of B. H. Stauffer Research Laboratory and is Licensed Only Per Contractual Terms & Conditions”.

That completes the material produced in response to the subpoena.

Mr. Harris: May I ask this, if the court please: Which of these name plates are produced in response to which of the paragraphs of the subpoena?

Mr. Lyon: I wouldn't know.

The Clerk: I will give these numbers after a while, when I have a chance. Will that be all right?

The Court: Yes. Mark them for identification and make them available to all counsel on both sides.

Are you ready to proceed, Mr. Lyon?

Mr. Lyon: Will those be given exhibit numbers?

The Court: The clerk will give each of them an exhibit number for identification, but those numbers we ordinarily do not read into our stenographic record until some reference is made in the record to the exhibits. [71]

They will have the clerk's tags on them so you may refer to them by their proper exhibit number if occasion arises to use them.

BERNARD H. STAUFFER

called as a witness in his own behalf, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Lyon): Mr. Stauffer, in connection with the conduction of your business under the name "Stauffer System", was a particular routine worked out for the treatment of the patients?

A. Yes, we have a standard routine of placing them on these various tables that we have.

Q. Did that include certain specified periods of time for treatment in each position?

A. Well, we worked out what we thought was the most effective treatment and we standardized it by so many minutes on each position on all four different types of tables.

The Court: I just don't follow you, Mr. Lyon, that is, as to how this fits into the case, because the patent is not for a method.

Mr. Lyon: You are correct, your Honor. The patent is for a device, but it is the plaintiff's position that the device, due to its inherent qualities, created this new business, this new system of treating the human body. [72]

I am bringing out the extent and the ramifications of that system which is based upon this apparatus.

The Court: Will it better enable us to understand the structure?

Mr. Lyon: Well, I will go on to another subject.

Q. (By Mr. Lyon): Mr. Stauffer, are you ac-

(Testimony of Bernard H. Stauffer.)

quainted with Lawrence Mack, president of the defendant organization? A. Yes, I am.

Q. When did you first meet Lawrence Mack?

A. He applied through a letter for a franchise—at that time I think he lived in Springfield, Missouri,—and our then present manager went back and consulted with him, and I think he started his first salon, I believe it was in Toledo, Ohio. That was his first franchise and that was 1946.

Q. That the record may be clear, Mr. Stauffer, are you referring to a Stauffer System salon?

A. A Stauffer System salon, yes, sir.

Q. You granted in 1946 a franchise to Mr. Lawrence Mack for Toledo, Ohio, is that correct?

A. Well,—

Mr. Cox: Just a minute, Mr. Stauffer. I object to this question, your Honor, and to this line of questioning upon the ground it is irrelevant, incompetent and immaterial to the issues raised in this case.

The relationship between the plaintiff and the defendant [73] or any representative of the defendant corporation is wholly irrelevant to the patent infringement issue which is raised by the complaint and answer. I have, if your Honor is in doubt about the propriety of the objection, authorities in support of it.

The Court: The court has this in mind: I don't think the line of inquiry has anything to do with whether the patent is or is not invalid or whether there is or is not infringement. Those matters must

(Testimony of Bernard H. Stauffer.)

be determined from an examination of the structures, of the patent and things of that nature.

However, in these patent infringement cases we often get a prayer for attorney fees and the statute is quite clear in its language, that the plaintiff who makes out a case is entitled to those fees.

However, one of our judges disallowed fees, as a matter of course, when he found for the plaintiff, and the Circuit Court sent the case back and said, "You can't allow fees unless there was some unconscionable dealing, some over-reaching, something which would cause a chancellor in equity to think it is only just because of some aggravation, to allow attorney fees."

Now, I don't know if I have stated it with exact nicety. I think, rather, I have not. But that is the general gist of the Appellate Court's view of it.

Since that time the judges here have always allowed [74] evidence of the type which Mr. Lyon is apparently going to adduce, in order that we can examine the equities with respect to the question of attorney fees, but not to use this evidence as bearing upon the issue of validity.

Mr. Cox: I think your Honor has stated it very exactly. However, the case, the two or three patent cases I have been able to find on the subject indicate that an inquiry into the unconscionable conduct, if any, of an alleged infringement is appropriate at the time or after an infringement has been found, after the court has found on the validity of the patent and in connection with an accounting for

(Testimony of Bernard H. Stauffer.)

damages. It is not material or relevant to any issues prior to the finding of an infringement.

I will be very happy, your Honor, to pass this brief memorandum that contains two material cases to the court and counsel.

The Court: You may pass it up and I will undertake to listen to the evidence with one ear and look at your memo with one eye.

But we have the custom in this district of sending the matter of damages to a special master, in the event that damages are to be awarded.

A special master is not the person who finds on the question of whether attorney fees shall be allowed. Hence, it has been the practice here to admit the evidence so that [75] the court may know whether to make an award of attorney fees and so declare in its findings of fact, conclusions of law and judgment.

Mr. Cox: I see, your Honor.

The Court: I don't mean to say that it is appropriate upon the real issues of infringement at all, but upon damages if damages are allowed. I will look through this memorandum.

Mr. Lyon: I might add, your Honor, that evidence will show that this Mr. Mack was a franchise holder—already has shown that—and as such a licensee under the patent in suit, which means that at one time he was in a position of accepting and agreeing to the validity of the patent in suit. He was estopped—

(Testimony of Bernard H. Stauffer.)

The Court: Those are things to be argued after you get your facts in.

Mr. Lyon: I am arguing the objection in the case——

The Court: I take it that you are going to undertake to prove those things because you told me in your memo you are.

Mr. Lyon: I see.

The Court: Let's not take unnecessary time for repetition here in the courtroom because the judge makes it a point to read these memoranda, and having read them I don't think it is ordinarily necessary to get the audio on it, too.

Mr. Lyon: Do I understand the objection has been [76] overruled?

The Court: It has been overruled but the ruling has been withdrawn because counsel has handed up a memorandum which he says will change my mind. I will just take a moment to read it.

Let's not have any proceedings until I have had that moment.

In this case presently before the court we are confronted with the challenge to the validity of a patent which is about to expire, that is, it has lived more than 15 of its 17 years.

I don't want to try the case piecemeal. If we try validity and then validity is found to exist, and we adjourn while I make that determination and then convene at some later date to try infringement, and then convene again to try the issue of whether attorney fees shall be allowed, the piecemeal litigation

(Testimony of Bernard H. Stauffer.)

would still be going on after the patent has lost the vitality that was allowed by statute.

So the court is inclined to try everything this sitting, including the antitrust feature.

Mr. Cox: I certainly bow to the court's ruling, and if all Mr. Lyon is proposing to demonstrate by this line of questioning is that Mr. Mack was a franchise holder under the Stauffer System, Inc., I will stipulate to that, to cut short the examination.

The Court: I think he may show the circumstances he feels will entitle him to attorney fees.

Mr. Lyon: Is there an unanswered question?

The Court: If there was, I think you had better ask it again because it is a way back in the notes.

Mr. Lyon: All right.

Q. (By Mr. Lyon): Thereafter did Lawrence Mack ever singly or in association with others acquire additional franchises of the Stauffer System, to operate Stauffer System salons?

A. Yes, he did. He acquired Akron, Ohio, Cleveland, Ohio, Detroit, Michigan, and participated on a working agreement on the salons I personally owned in Chicago.

Q. Will you describe the relationship between yourself or your partnership and Mr. Lawrence Mack, with respect to Chicago, a little bit more completely?

A. Well, in those several salons we had, it was during a time when travel was very hard—

Q. Excuse me. At those salons in Chicago, were

(Testimony of Bernard H. Stauffer.)

they salons that were franchised out to someone else? A. No.

Q. Or were they salons personally owned by you or the Stauffer System?

A. They were personally owned by the Stauffer System.

Q. Go forward with your answer. [78]

A. They were turned over to Mr. Mack to manage, with a working agreement. That was probably four years after Mr. Mack first started with the Stauffer System.

Q. As a manager of your salons in Chicago, would Mr. Mack have had under his care and his supervision Stauffer tables of the type which you assert in this litigation is covered by your patent?

A. Well, he had the use of all these tables in his own salons, as well as access to them in the ones that he managed for me.

Q. And any know-how that went along with those tables, would he have had access to that?

A. Well, the perpetual training and the perpetual information that we gave our salons and still do was, of course, an education itself, as to how to conduct these salons.

Mr. Mack had full access to everything that we had in the business operation.

Q. While he was still operating salons as a franchised holder, did Mr. Mack, to your knowledge, make any plans or arrangements for divorcing himself from the Stauffer System?

A. Well, he opened up—while he was still man-

(Testimony of Bernard H. Stauffer.)

aging my salon in Chicago he opened up a system in the same building, in competition to my operation, at 30 West Washington.

He opened up additional salons in the New York area, predicated on the same principle. [79]

Q. Did he take with him, when he opened these new salons, any of your own employees?

A. He took practically all our employees but two people.

Q. Do you happen to be acquainted with the manager of the Slenderella salon—

Mr. Lyon: You may correct me if I have the wrong address. I believe it is 610 South Broadway, Los Angeles?

Mr. Cox: There is a salon at that address.

The Witness: I don't know the present manager, no.

Q. (By Mr. Lyon): Do you happen to know the name of the woman who is the manager of Slenderella Systems of California Incorporated?

A. I know her, but I can't think of her name. But she was—

Q. She has changed her name, hasn't she?

A. Yes, she has. She was an employee at one time of the Stauffer System in Chicago.

Q. Now, is it not a fact there was previous litigation between you and Mr. Mack?

A. Yes, sir.

Q. And is it not a fact that that litigation ended up in a settlement contract by which the parties, as a certain date in 1953, exchanged mutual releases?

(Testimony of Bernard H. Stauffer.)

A. Yes, sir.

Q. I show you a document which is Exhibit A to [80] Defendant's Second Request for Admissions, which you have admitted is genuine, as a record in this case, and ask you if that is the document you just referred to? A. Yes, sir.

Q. I note that this document recites that:

“ . . . in further consideration of a release of the undersigned executed by the persons and corporations hereinafter named under even date herewith, have, jointly and severally, remised, released and forever discharged, . . . ”

That indicates to me there was another document running from Lawrence Mack, Mr. Blanchette and the people listed in this document, to you or Stauffer System, Inc., by way of a general release.

Can you produce any such document?

A. I don't think we have been able to find it to this date.

Q. But do you have an independent recollection of such a document?

A. Yes, there was such a document.

Q. It was in general terms like most of these releases are? A. Yes, sir.

Q. Perhaps the court would be interested in knowing about the circumstances concerning the disappearing of your [81] safe. Would you like to make that of record? A. We have had—

The Court: This doesn't seem to bear upon unconscionable acquisition of a knowledge of the structure or of the design and so on.

(Testimony of Bernard H. Stauffer.)

It seems to go more to an unfair competition feature, which is not raised by the pleadings in this case.

Mr. Lyon: Well, deliberate infringement is always considered by the courts in matters of this type, and this shows that the president of the defendant was fully aware of the structures, made so as an officer, acting as a trusted employee, and with that situation in mind, while charged with management of our own business in Chicago, he was building a salon right next door in the same building, preparing to go into competition.

If there was ever a case of deliberate and willful infringement, this is it.

The Court: I wouldn't raise any object to that, but I don't see how it would make any difference if he cracked this safe or not.

Mr. Lyon: Oh, no, your Honor. I am just pointing out this is a lost document because someone stole our safe which had all our valuable documents in it. Just showing the reason for not producing our copy of the release.

The Court: Well, the release would not tend [82] to show, would it, anything that would bear——

Mr. Lyon: It is out of order, I will admit. I should be proving this release at another time, but while I had this witness on the stand and while we are talking about Lawrence Mack, it was convenient to prove the existence of another release running from Mack to Stauffer, on the basis of which

(Testimony of Bernard H. Stauffer.)

I will argue later that no evidence prior to the general release should be admitted in this case.

Mr. Cox: I just want to refer briefly, your Honor, to the analogy of Mr. Lyon's position.

On one hand he accuses the president of the defendant corporation of unlawful, illegal and improper conduct. In the same breath he averts to a general release back to that same individual, together with the corporation he represents, presumably and on the face of it two or three years subsequent to the alleged improper conduct.

I suggest that further demonstrates the impropriety of this entire line of investigation, your Honor .

The Court: Of course, a release always refers to present rights. It doesn't refer to future rights.

Mr. Lyon: That is right.

The Court: I have opened the door to this line of questioning, which I have now sought to some extent to close again, not all the way, hoping that counsel would limit it to the time intervening between the execution of the release [83] and the present day.

Mr. Cox: The court will have noted it all antedates the period of the release, their relationship which has just been inquired into.

Mr. Lyon: I am through with that line of questioning, except I would like to have this document received in evidence and I would like to make my record as to the fact that the lost document is lost because someone stole our safe.

(Testimony of Bernard H. Stauffer.)

I certainly am not accusing anybody having anything to do with this case of stealing our safe. But we did lose our safe and a great number of our valuable documents.

The Court: All right. Go ahead and prove it.

Q. (By Mr. Lyon): Go ahead and explain the situation about the safe, Mr. Stauffer.

A. We had not one but four or five robberies, and in one they backed a truck up and carried off a 600-pound safe, including most of our valuable papers. That has been our problem here with some of these documents that they requested.

Q. Whenever we can't find a document, we just assume it was in the safe?

A. Yes, that is correct.

Q. You are making that assumption with respect to the release that ran to you in this case?

A. That is correct.

Mr. Lyon: I will offer as Plaintiff's exhibit [84] next in order a photostatic copy of the Stauffer System, Inc.—Mack et al agreement of September 25, 1953.

The photostatic copy is an unexecuted copy, but I believe it will be stipulated by both parties the same was executed by Mr. Stauffer as president of Stauffer System, Inc.

Mr. Cox: No objection. That is so stipulated.

Mr. Lyon: What exhibit number will that be?

The Clerk: This will be Plaintiff's Exhibit No. 15. The other exhibits are marked Plaintiff's Exhibits 7 through and including 14.

(Testimony of Bernard H. Stauffer.)

(The exhibits referred to were marked Plaintiff's Exhibits 7 through 14, for identification.)

The Court: This one is admitted into evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 15, was received in evidence.)

[See Book of Exhibits]

Mr. Lyon: You may cross examine.

Cross Examination

Q. (By Mr. Harris): Mr. Stauffer, you are not a Doctor of Medicine, are you?

A. No, I am not.

Q. You have never been licensed to practice medicine in the State of California or elsewhere, have you? A. No, I haven't.

Q. You are not an engineer, licensed to [85] practice engineering in the State of California, are you? A. No, I am not.

Q. You have had no academic or technical background in either engineering or medicine, have you?

A. No, sir.

Mr. Harris: I produce three drawings, one dated 7-22-55, one dated 7-19-55, and one dated 8-20-55, all stamped "Stauffer System, Los Angeles 4, California," which I ask be marked for identification as Defendant's Exhibits A-1, A-2 and A-3.

(The exhibits referred to were marked Defendant's Exhibits A-1, A-2 and A-3 for identification.)

Mr. Harris: I might say, if the court please, these are drawings which Mr. Lyon delivered to me

(Testimony of Bernard H. Stauffer.)

in response to our request to him for a drawing or drawings of the present machine made by the plaintiff in this case.

Q. (By Mr. Harris): Mr. Stauffer, I show you these three drawings which have been marked for identification, and ask you if you recognize those as drawings of the plaintiff's salon-type machine?

A. That is correct.

Q. Which one, the Rith-Matic or the Stauffer machine?

A. They are one and the same; and I testified on that yesterday.

Q. They have the same mechanism, do they, [86] those two machines? A. That is correct.

Q. And is this mechanism substantially the same as that embodied in the physical exhibit, the home unit machine, Plaintiff's Exhibit 2 for identification, which was here in the court yesterday?

A. They are both a couch, they both have the slot coming up through, permitting the paddle to operate in a tilting manner. The belt and the pulley arrangement is different.

Q. Is the motion——

A. The motion is identical.

Q. Is the motion of the pad or seat or applicator or paddle, as you call it, the same in all three types of machines? A. Yes, they are.

Mr. Lyon: At this point, your Honor, I think if it isn't already admitted, I would like to have Exhibit 2 introduced in evidence.

(Testimony of Bernard H. Stauffer.)

The Court: I don't recall what it was. What is 2?

Mr. Lyon: This home unit over here in the floor (indicating).

Mr. Harris: We have no objection.

The Court: We have all been proceeding on the theory it is in evidence.

Mr. Lyon: Mr. Harris called it Plaintiff's [87] Exhibit 2 for identification, which gave me some concern in that regard.

Mr. Harris: We have no objection.

The Court: It is now received, if it has not been received before.

(The exhibit referred to, marked Plaintiff's Exhibit No. 2, was received in evidence.)

Mr. Lyon: It was not so marked.

Q. (By Mr. Harris): Now, Mr. Stauffer, I have placed an enlargement of the drawing, Sheet 1 of the drawings of the Stauffer patent in suit, on the blackboard in front of you.

I propose to proceed to have you compare certain features of the machine illustrated by the drawings, Defendant's Exhibits A-1, A-2 and A-3, with the mechanism shown in the drawing of the Stauffer patent in suit.

First, these drawings do not show—the drawings I am referring to now are Defendant's Exhibits A-1, A-2 and A-3—any couch, do they? There is no couch actually shown in these drawings?

A. Well, these were drawings that, let us say,

(Testimony of Bernard H. Stauffer.)

were shop drawings of the mechanism only as it is put together in our shop. So what you have is strictly the mechanism and not the unit as a whole.

Mr. Lyon: We will stipulate there is no couch shown there, Mr. Harris.

Mr. Harris: Certainly. [88]

Q. (By Mr. Harris): And referring particularly to the drawing marked Exhibit A-3 for identification, where does that mechanism set, or how is it disposed with relation to the couch?

A. This unit here—(indicating)—

Q. Excuse me. By that you are referring—

A. This tubing that comes around in this manner (indicating) supports the entire mechanism. That bolts right up under the table and permits this section here (indicating) to extend up through the slot in the table, permitting the identical action on all three units.

Q. Excuse me. By this mechanism that is to be bolted to the top of the table, you are referring to the tubular construction marked with 8 on the drawing, is that correct?

A. That is correct, yes.

Q. So the two ends of that tube, as shown in this drawing, are bolted underneath the top of the couch?
A. That is right, yes, sir.

Q. So that the support which carries a paddle, marked 2 on the drawing, extends up through this slot in the couch, is that correct?
A. Yes, sir.

Mr. Lyon: Well, so the record may be clear, this

(Testimony of Bernard H. Stauffer.)

is really a cross member like that (indicating), that receives the padding. [89]

The Witness: This is the casting of which the padding goes on (indicating).

Q. (By Mr. Harris): Will you please mark on the drawing with a pencil what you have referred to as "this" with A?

A. (Witness complies.) Casting.

Q. No, that is enough, thank you, Mr. Stauffer. And in the table shown by this drawing, Defendant's Exhibit A-3, how high above the table does the paddle No. 2 on the drawing extend? How high is it above the top level of the couch?

A. Well, by the time you get the padding on there, which is something I can't tell you right now, it is computed to be the same, identical, as the original.

Q. What do you mean "the same as the original"?

A. Well, our—that is the original drawing you have displayed there.

Q. The same height?

A. The same motion is, from here to the top of this paddle will be identical, as to the distance there (indicating).

In other words, the axis here, through which that travels, is the same as the axis on this one in its travel (indicating.)

Q. Now, you say there is a pad in the actual tables that fits on top of this member that is marked 2 on this drawing? A. Yes, sir.

(Testimony of Bernard H. Stauffer.)

Q. Would you please sketch that pad in with a pencil [90] I have here?

A. Well, it would be something like this (indicating).

Q. Is that a flat pad or is it a convex pad?

A. It is a flat pad very—exactly as we have on the home unit; flat and square pad.

Q. So that this salon-type table, which is illustrated in Defendant's Exhibit 3, is hung from the top of the couch and is not supported on an independent base, as shown in your patent in suit, that is correct, is it not?

A. That is right. We have carried it from the top, rather than from the bottom support.

Q. This arm that extends upwardly and which carries the paddle 2 in this drawing (indicating), Exhibit A-3, that arm has a pivot at its lower end, which is marked 24, does it not? A. Yes, sir.

Q. In that table there is no connecting rod connected to the arm at any point between the pivot 24 and the pad 2, as is the connecting rod 28 connected to the support 20 in your patent in suit?

A. No, other than we have connected it to the same shaft, and we have extended it down below, instead of up above, for machining purposes primarily. [91]

Q. It is a different construction, however?

A. It is a different position in which it is taken. The end result is identical, but the method of arriving at it has been changed.

Mr. Harris: If the court please, I move to strike

(Testimony of Bernard H. Stauffer.)

the last answer of the witness as being non-responsive and volunteered.

The Court: Granted.

Q. (By Mr. Harris): Now, referring to the drawing, which has been marked as Defendant's Exhibit A-1 for identification, the part numbered 31 on that drawing is the motor, is it not, the electric motor? A. Yes, sir.

Q. The part numbered 18 is a small pulley, is it not? A. Yes, sir.

Q. And that small pulley, in the mechanism shown by the drawing, is adapted to be connected to a large pulley 16 by a belt 19? A. Yes, sir.

Q. The large pulley 16 is carried on an idler shaft 14, is it not? A. Yes, sir.

Q. On the other end of which is mounted a second small pulley 18, is it not? A. Yes, sir.

Q. And that latter small pulley through a belt is connected to and drives a larger pulley, which is mounted on a shaft marked 6 on the drawing?

A. Yes, sir.

Q. By the belt 20. A. Yes, sir.

Q. And that shaft 6 is a transverse shaft, which extends transversely across the unit, and is mounted in bearings close to each end of the shaft, is it not?

A. Yes, sir.

Q. And mounted on that shaft at center or approximately at the center is an eccentric or cam, is it? A. Yes, sir.

Q. And that cam, in turn, is connected through

(Testimony of Bernard H. Stauffer.)

a connecting rod to the upwardly extending arm that carries the paddle 2, is that correct?

A. That is correct.

Q. In this drawing, Defendant's Exhibit A-1 for identification, there is thus a gear reduction between the drive shaft of the motor and the idler shaft 14, by reason of the difference in pulley sizes, differences in the sizes of the pulleys 18 and 16, is there not?

A. Yes, sir.

Q. Again there is a second gear reduction between the idler shaft 14 and the cam shaft or eccentric shaft 6, [93] through the difference in sizes of the pulleys 18 and 20, is there not?

A. Yes, sir.

Q. There is no such double gear reduction in your patent in suit, is there? There is only a single gear reduction, which is from the drive shaft of the motor 50, the small pulley mounted on that shaft, to the large pulley 48, which, in turn, drives the cam shaft 42.

A. We merely acquired the same speed by using the lower speed motor.

Q. There is a lower speed motor used in which ones?

A. In the first ones, where there is only one stage of reduction.

Q. But there is only one stage of reduction in your patent in suit?

A. That is right, yes, sir.

Q. Did you ever build any machine exactly as is illustrated in the drawings of your patent in suit?

(Testimony of Bernard H. Stauffer.)

A. When we first started we built them just exactly like that (indicating).

Q. You built only ten or fifteen?

A. Oh, no. The first year or two that is all we built, is that.

The Court: You mean ten or fifteen or your total output? [94]

The Witness: No, when we first started to build them they were built on this basis (indicating).

The Court: By "this basis" you motioned toward Figure 1, 2 and 3 of Patent No. 2,240,679?

The Witness: Yes. I don't know just how long we built them that way, but there was considerable time that we built them in that manner.

Q. (By Mr. Harris): Mr. Stauffer, you recollect, do you not, the taking of your deposition on December 21, 1955, at the offices of Mr. Cox, who is associated with me here in this case? You remember that, do you not? A. Yes, sir.

Q. You remember, do you not, that as shown at page 84 of that deposition I asked the following questions and you gave the following answers:

"Q. Did you, the partnership or the corporation, ever make or have made for you any table as is shown in that patent?

A. "Yes, the original table was just like that.

"Q. How many tables were so made that were just like the construction in there?

"A. I would say ten or twelve, something like that.

(Testimony of Bernard H. Stauffer.)

“Q. And then the construction was changed, was it? [95]

“A. The motion of the table wasn't changed. The mechanics that approached the motion were changed.”

You remember so testifying, do you not?

A. Yes, sir, and that is just about—I stated then ten or twelve, and the first year or so we didn't build too many of these tables, Mr. Harris.

I was just estimating it, and that is about the size of it.

Q. As you so testified.

A. I beg your pardon?

Q. As you so testified in your deposition.

A. Yes, sir.

Q. What was the speed of the motor or motors in those first tables that you built, in accordance with your patent in suit?

A. As I remember, we used 1150 r.p.m. motor.

Q. What is the motor speed in the motors which you use in your present day— A. 1750.

Q. Is that true in your Stauffer salon table, in your Rith-Matic salon table, and in your home unit table?

A. The manufacturing of the motors today is primarily all 1750 revolutions.

Q. Are the motors in all three types of tables, which I have just enumerated, the same? [96]

A. They are the same, 1750, yes, sir.

Q. I might ask you, Mr. Stauffer, with respect to these drawings which you have before you, De-

(Testimony of Bernard H. Stauffer.)

pendant's Exhibits A-1, A-2 and A-3, and with respect to the height of the pad or paddle 2 above the couch top, when that mechanism is installed in a couch how does that correspond with or differ from the height of the pad or paddle above the couch top in the home unit, Exhibit 2 in evidence here?

A. Well, I would say there is some variation of the height in some of our models. The length of travel is quite an item in the arc that it travels through, and we have always tried to maintain three-quarters of an inch in the mechanical design.

Q. Three-quarters of an inch overall?

A. In the travel of the platform.

A. A total movement of three-quarters of an inch, is that correct?

A. That is right, yes.

Q. Can we summarize your testimony with regard to your three types of present tables, that is, the home unit, the Rith-Matic salon and the Stauffer salon tables in this way: That the nature of the movement of the pad or paddle in each of those three tables is substantially the same?

A. Yes, sir.

Q. And that is true as to all tables which you [97] have manufactured or sold, is it not?

A. We have tried to maintain that same motion, yes, sir.

Q. Referring you again to the drawing of your salon type table, which is marked Defendant's Exhibit A-3 for identification, and particularly to the

(Testimony of Bernard H. Stauffer.)

upstanding arm A, which you have marked as "A" on the drawing, it is a fact, is it not, that in the operation of this device the arm A moves in an arc about the pivot 24? A. Yes, sir.

Q. And in moving in that arc it moves in substantially equal distances on both sides of the vertical, taken through the pivot point?

A. It can be adjusted through 11 to suit any angle that you wish, by shortening or lengthening this threaded nut in there (indicating), which you will see was made for that specific purpose.

Q. But actually when you operate these tables in your own salons, the arm or support A does move through an arc on both sides of the vertical, substantially as in this home unit, Plaintiff's Exhibit 2, which is in evidence here in court?

A. Yes, sir.

Q. And that is an arc about a total of eight degrees, is it not, four degrees on each side of the vertical? [98]

A. Primarily, we try to always get it over in this angle, to bring it in just up or a little past that, depending on this adjustment here (indicating).

In other words, in this adjustment, it should be adjusted in such a manner that the arc goes further to one side than it does to the other.

Q. But it does go on both sides of the vertical, does it not? A. Yes, it does.

Q. That is true in the home unit, Exhibit 2 which is here in evidence, is it not?

(Testimony of Bernard H. Stauffer.)

A. That is right, yes, sir.

Q. All the tables which you have made and used commercially have that type of movement in the operation of the pad or paddle?

A. Basically, they are stronger on one side, but they do go past the vertical point.

Q. In none of these tables which you have actually used have you had the support for the applicator or pad, which is marked "A" on this drawing before you, move through a small arc on only one side of the vertical?

A. Would you state that again, please, sir?

Mr. Harris: May it be read, please?

The Court: Yes.

(The question was read.) [99]

The Witness: When we first started that was the idea, but as time proved we could extend it over into the other, why, we did extend it past that top point.

However, we have primarily kept to one side for the major motion of the paddle.

Q. (By Mr. Harris): You are familiar with the fact, are you not, that in your patent in the drawing and in the specification of the patent there is described a device in which the support 20 moves only on one side of the vertical, through a small arc of about ten degrees, from about minus fifteen degrees to minus five degrees from the vertical?

A. Yes, sir, I am familiar with it.

Q. So far as your patent is concerned—we are not speaking now about your commercial machines

(Testimony of Bernard H. Stauffer.)

in any way—but so far as your patent is concerned, that small arc of movement is a very important factor, is it not? A. It is, yes, sir.

Q. And the purpose in the device described in the specification and illustrated in the drawings of your patent in suit, the purpose in limiting the travel of the seat 18 to an arc, which is on one side of the vertical, is to establish a better motion of the seat as it is applied to the human anatomy, is it not? A. That is correct, yes, sir. [100]

Q. As a matter of fact, Mr. Stauffer, you regard that motion applied through the travel of the seat, in your patent in suit, as it is applied to a body? In other words, that motion to and fro, running through that degree of angle we referred to, has the essential factors or features of your patent in suit, does it not?

A. I would consider it important in the treatment process, yes, sir.

Q. But you do consider it as the essential factor in your patent in suit, do you not?

A. Well, I would say one of them.

Q. Referring again to the speed of movement of the pad or paddle in your commercial machines, illustrated by Plaintiff's Exhibit 2 in evidence and Defendant's Exhibits A-1, A-2 and A-3 for identification, is the speed of the movement of the pad in those machines in any way critical in obtaining the results claimed for in your patent, in the specification of it?

A. Well now, it depends upon what you say—

(Testimony of Bernard H. Stauffer.)

what you mean when you say "critical". Critical within a hundred cycles a minute, yes. Critical within four or five cycles a minute, no.

Q. In other words—

The Court: I don't see anything in the patent with reference to the speed. [101]

The Witness: Yes, we identify it as 130, your Honor.

The Court: You do? Where?

Mr. Harris: I was coming to that, if the court please.

The Court: All right.

Q. (By Mr. Harris): In other words, if the speed of the paddle is too fast you don't get the results stated in the specification of your patent, do you? A. No, sir.

Q. If the speed, on the other hand, is too slow you do not get the results claimed for in your patent application? A. That is correct.

Q. What are the maximum and minimum speeds permissible to obtain the results set forth in the specification of your patent in suit?

A. I think you could extend it 20 cycles a minute either direction and have less effectiveness than you would at the 130 cycles a minute, as we set as normal.

Q. 20 or 30 cycles per minute from what speed?

A. From 130, which is the one that we refer to in ours.

Q. You have a copy of your patent in suit before you, Mr. Stauffer? A. No, sir, I don't.

(Testimony of Bernard H. Stauffer.)

Q. I place Exhibit 1, the patent in suit, before you. [102] Will you kindly point out to the court any statement in your patent in suit as to the speed or movement of the pad or applicator 18?

A. I guess I was mistaken. I was reading one of the other patent applications. This one does not so state that I can find.

Q. Mr. Stauffer, you testified, I believe, yesterday that in the operation of the home unit, Plaintiff's Exhibit 2 in evidence, the motion of the pad or paddle is from the head to the foot of the table.

Which is the head and which is the foot of that table?

A. Well, I would say it depends upon the way the body laid on it. Normally, we consider the head towards the slight angle of degree, as being placed with the—may I illustrate here?

Q. Yes, certainly.

A. We consider the pitch being this way (indicating), as the head going this way. Or you can change it around and put the head on this area (indicating) and have—depending on which way the body is placed on it.

Normally, in the treatment process that we have considered we like to have them be placed with the head in the direction of the angle, slight angle of the platform.

Q. But so far as your commercial tables are concerned, your No. 1 table, exemplified by Exhibit 2 here, and the [103] Rith-Matic table, the mechanism which is shown in these drawings, De-

(Testimony of Bernard H. Stauffer.)

fendant's Exhibits A-1 to A-3, in the ordinary commercial operation of those tables, all three of them, the user or patient can lie on the table with his head at either end, can he not? A. Yes.

Q. And the same thing is true of the table shown in the patent in suit, is it not?

A. Yes, sir.

Q. I place before you, Mr. Stauffer, Plaintiff's Exhibits 5 and 6, which are these cards. Those merely show an artist's conception of the Stauffer tables, do they not? A. Yes, sir.

Q. They are not intended to be mechanical drawings showing the tables in correct proportion or in correct size? A. No, sir.

Q. And they do not accurately show the tables, actually, do they?

A. They are, just as you say, artist's drawings.

Q. Neither shows any of the operating mechanism of the table, does it? A. No, sir.

Q. Except the pad or applicator above the table top?

A. It merely shows the position of the body while on the applicator on the couch. [104]

Q. You were present yesterday in court, were you not, and saw the running of the motion picture, the film which is marked as Plaintiff's Exhibit 3? A. Yes, sir.

Q. It was a fact, was it not, that in that motion picture in one sequence the model was seated on the machine, seated on the paddle of the machine, with her back to the camera? Do you recall that?

(Testimony of Bernard H. Stauffer.)

A. Yes. It was impossible to photograph the body while it was down, lying on the unit, so they had to set the model upright so we could show the expansion of the vertebrae and the motion of the unit.

Q. Is that actually one position of use of your commercial machines?

A. It could be, but normally we don't recommend it.

Q. In other words, if a patient wanted to sit on it, she could?

A. Let's say it has never been one of the Stauffer Systems.

Q. And that would be one position of use of the machine illustrated in your patent in suit, would it not?

A. I beg your pardon? Would you state that again, please?

(The question was read.)

Q. (By Mr. Harris): In other words, you could [105] sit on the paddle of the machine illustrated in your *patient* in suit equally well and have the treatment, could you not?

A. Well, we wouldn't recommend it. It has never been used as such in our salons.

Q. Now, in any of these machines of yours, the home unit, exemplified by Plaintiff's Exhibit 2, and the Rith-Matic salon table, or the Stauffer salon table, you could put your feet on the pad or paddle while the machine is operating, to exercise or massage the bottoms of the feet, could you not?

(Testimony of Bernard H. Stauffer.)

A. We exercise the legs, but not necessarily the bottom of the feet.

Q. But it could be so used?

A. Yes, sir, it could be so used.

Q. The same is true of the machine illustrated in your patent in suit, is it not? It could be so used?

A. It could be, yes, sir.

Mr. Harris: If the court please, we have not had an opportunity to examine the documents and things which counsel have produced here, and I would respectfully request a short recess, if I may have one, to permit us to just see briefly what those things are, because I think I may wish to cross examine Mr. Stauffer as to some of them.

The Court: All right. Short recess.

(Whereupon, a recess was taken from 3:01 p.m. to 3:20 p.m.) [106]

The Court: Are you ready to proceed?

Mr. Harris: Yes. Thank you, your Honor.

Q. Mr. Stauffer, all of your relations with Lawrence Mack, directly or indirectly, were prior to September 25, 1953, were they not?

A. Well, approximately, I would say, that was the date.

Q. The date of the release which is here in evidence?

A. Yes, sir.

Q. Mr. Stauffer, there have been produced here, in response to the subpoenas of the defendant, directed to you and your counsel, certain name plates which have been marked as Plaintiff's Exhibits 7 to 11, inclusive.

(Testimony of Bernard H. Stauffer.)

First of all, I shall display these to you. Do you personally have any knowledge of the use or extent of use of those name plates or name plates like them?

Mr. Lyon: I object to this line of questioning as not proper cross examination.

The Court: Just what does it go to? The name plate, certainly, will not establish the validity or invalidity of the patent.

Mr. Harris: They go only to this, your Honor, the question of marking. In the plaintiff's complaint he has alleged that he has marked all machines made under this patent with the patent number. It goes simply to that question, which we suggest is proper cross examination. [107]

The Court: All right. You may proceed with it.

Do you remember the question, Mr. Stauffer?

The Witness: I only knew them in a general manner.

Q. (By Mr. Harris): Referring first to the name plate marked Exhibit 6, was that name plate or ones like it ever used on any machine built or operated by you or under your direction?

A. That was the only one of the Stauffer System tables that we sold, yes, sir.

Q. The one that was entitled "Rith-Matic"?

A. Yes, sir. That was the one that has been sold.

Q. During what period of time were name plates of this type actually put on the tables that you sold? A. I couldn't answer that.

(Testimony of Bernard H. Stauffer.)

Q. You don't know whether any were ever put on the tables that you sold, do you?

A. I am sure that practically all of them, to my knowledge, had the "Rith-Matic" name on it, if they were sold.

Q. You don't know whether they had this particular name plate on, though, do you?

The Court: I can't recall, counsel. Probably the patent law requires a marking of some sort, but I don't recall it.

Is it like the copyright law or trademark law?

Mr. Harris: It requires marking, yes, your [108] Honor. There are two points on this.

First, it is unlawful under the patent law to mark something patented which is not patented. It is unlawful, it is illegal. It is a subject for a *qui tam* action.

Of course, in this case we are not contending now or we shall not contend that Mr. Stauffer is guilty of any crime, whether he marked or didn't mark his tables, but——

The Court: Or for any civil penalty.

Mr. Harris: Or for any civil penalty in this case, that is correct. But it has the further point, that there is a requirement in the patent law that a patentee shall mark his tables, which point goes to the question of damages. However——

Mr. Lyon: If I may be heard on that. There is no such requirement.

The law is that if a patentee has failed to mark, then he is limited to damages—in recovering dam-

(Testimony of Bernard H. Stauffer.)

ages, to a time after the defendant knew of the patent. Certainly, this defendant knew of the patent.

Mr. Harris: At any rate, that goes to the question of damages. We are not to that point in this case, anyway.

But there is the further point—and this is the important point I am driving it—and that is, if Mr. Stauffer made and used these machines over a period of years and did not mark, he knew himself [109] that this patent didn't cover his machines, which is our contention, of course.

So I think the question of whether he marked or not is germane to the issues in the case.

The Court: I appreciate now what question you are getting at.

Mr. Harris: Thank you.

The Court: I didn't know whether we had a marking requirement in patent as in copyright or not.

Mr. Harris: It isn't the same type of marking requirement. It is the requirement only, as Mr. Lyon stated, it goes to the recovery of damages by the plaintiff.

Q. Now, referring to Plaintiff's Exhibit 8, has that marking plate ever been used on any tables made, used or sold by you or under your direction?

A. That is one that I think—now, I am not positive on this, but generally I would say we used that on our own personal property we did not sell.

Q. In other words, the salon tables you leased or rented to franchise holders, is that correct?

(Testimony of Bernard H. Stauffer.)

A. That is right. That was our own personal property and we never extended it out of our hands.

Q. Those were tables which have been referred to here as tables leased or licensed by these franchises that you granted?

A. These were the ones that were licensed to the [110] franchise and many times they would have this one, which is identified as our property, together with another one that I don't see here.

Q. Well, "this one"—

A. Very often they had the combination here.

Q. This name plate, Exhibit 8, says on its face, "This Apparatus Property of Stauffer System".

A. That may have been one we used on, let us say, some of the equipment that wasn't patented.

Now, whether that went on No. 1, I don't know, but this is normally the one that went on where we said it was our property and it still carried the serial number.

Q. You don't mean the serial number, do you?

A. I mean the patent number.

Q. There is a serial number on that one, also?

A. The patent number.

Q. On "that one", you are referring to Exhibit 11? A. Yes.

Q. Over what period of time was this Exhibit 11 used? A. I wouldn't have any idea.

Q. Referring to Exhibit 9, Plaintiff's Exhibit 9, do you recognize that as being a label used on your tables?

(Testimony of Bernard H. Stauffer.)

A. Yes, I would say that we used that.

Q. On the No. 1 tables?

A. I would say we used it on the No. 1 tables.

Q. Over what period of time?

A. That I don't know.

Q. And referring to Exhibit 10, is the same true as to that exhibit?

A. Well, on this one I don't know what table it went on. Apparently, it didn't go on the table with the patent, because the patent number isn't on it. We may have used it on another table.

Q. The fact is, is it not, Mr. Stauffer, that prior to the middle of 1953 you never used the patent number of the patent in suit on any tables made, used, leased or sold by you, directly or indirectly?

A. To the best of my knowledge they all had them on.

Q. During what period of time?

A. Well, from the time we received our patent.

Q. Until the present?

A. Until the present time. You haven't got the old Rith-Mo—this is the Rith-Matic, but the old style label apparently isn't here.

Q. You are familiar with the table, the salon type Stauffer table which was exhibited to me, to Mr. Hudson Cox at your plant on October 16, 1956, with Mr. Lyon and Mr. Teasdale? You are familiar with that table, are you not?

A. Yes, I think I saw it in the back, yes.

Q. You saw us there, did you not? [112]

A. Yes, I did.

(Testimony of Bernard H. Stauffer.)

Q. You know, as a fact, that that table had no patent number on it, did it?

A. I don't know that, no. I think it was brought up out of the factory and still being in our possession didn't have the complete number put on it.

Q. Up to the present time have you personally ever seen any of the defendant's tables?

A. No, sir, I have not.

Q. And prior to this suit, the filing of this suit, neither you nor anyone in your organization had drawings or sketches of construction or mechanism of any of the defendant's tables, did you?

A. Not drawings, no.

Q. You had no information as to the detailed construction of the defendant's table or tables, did you?

A. We had information as to how it worked.

Q. The type of treatment it gave, and that is all?

A. No, the method in which the table functioned.

Q. By that you mean the movement of the paddle or pad?

A. By that I mean the similarity in the motion of the pad in relation to the slot, in relation to the position that the body was put on the movable platform, et cetera.

Q. And that was the only information you had, was it not? A. Yes, sir. [113]

Q. During your direct examination yesterday, Mr. Stauffer, you rearranged the home unit table

(Testimony of Bernard H. Stauffer.)

that was here in court, Plaintiff's Exhibit 2, to give a transverse motion to the pad and paddle.

That cannot be done with any of your other tables, can it?

A. No, sir, not the salon tables.

Q. Referring back to these name plates, Plaintiff's Exhibits 7 to 11, inclusive, who made those name plates for you?

A. I think Kennedy Name Plate is usually the one that makes our name plates.

Q. Have they been making them throughout the years for you? A. Yes, sir.

Q. Do you have any record of your purchases of name plates?

A. Well, I imagine we have for the last five or six years, but not for the 19 I am sure.

Q. I think during your direct examination you stated that in or about 1946 you had franchised some two hundred salons to use the Stauffer System, as you refer to it, in all 48 states. [114]

A. I think between '46 and '48 it ran to approximately two hundred salons, yes, sir.

Q. But in '46 you had a very substantial number of such salons operating, did you not?

A. Well, we had considerable, yes.

Q. And I think you said on direct examination that as of now you have approximately two hundred franchised salons, is that correct?

A. In excess of that, yes.

Q. Prior to the advent or the entry of the defendant Slenderella System, or any of its related

(Testimony of Bernard H. Stauffer.)

companies, into this business of providing passive exercise by mechanical couch-like machines, your Stauffer System and its use was the only system in use at the time, and prior to that time, the advent of Slenderella, for this type of thing, was it not?

A. It was the only one that used it mechanically. There were others that used it electrically.

The Court: I don't understand just what you are saying.

The Witness: Relaxacizor has an electrical apparatus they claim exercises muscles, puts electricity in the tissues.

Mr. Harris: Did your Honor wish to inquire further?

The Court: Well, what is the contact with the body, electrical current? [115]

The Witness: Yes, sir, it is a sinusoidal current that strictures the muscles. They claim it is an exercise.

Ours at that time was the only extended one that exercised it mechanically.

Q. (By Mr. Harris): So far as a couch-like table upon which a patient or user reclines, to take the treatment, your Stauffer System was the only system in use prior to the advent of Slenderella, was it not? A. Well, in a large way, yes.

The Court: That calls for a pretty big conclusion, I should say. He can answer as to whether he knows of any, but in your opening statement yesterday you suggested that there were several,

(Testimony of Bernard H. Stauffer.)

at least, which had reached the stage of being patented—

Mr. Harris: Oh, well,—

The Court: —so they might have been invented and used.

Mr. Harris: Yes, but I am speaking about business competition.

Q. In reducing or exercising salons for ladies yours was the first, was it not, in which they used a couch-like structure with an applicator, a movable applicator? A. To my knowledge, yes.

Q. You have been familiar with that business all over the United States, from the very beginning, have you? A. Yes, sir. [116]

Q. If there had been any others, you would have known it, would you not? A. I may have.

Q. As a matter of fact, as of today *Slenderella* is your only competition in this type of business, is it not?

A. Oh, no, there are quite a number of them.

Q. I am talking simply about business predicated upon a couch upon which a patient or a customer reclines to have a treatment by means of a movable applicator of some kind.

A. I know of three others.

Q. What are they?

A. Well, there is *Slim Line*. There is one in Texas that is operating on the same basis out of Dallas. And one operating in Toledo.

Q. What sort of a machine does *Slim Line* use?

A. It is mechanical, operating in a similar man-

(Testimony of Bernard H. Stauffer.)

ner as this. That is what I have been informed. I have never seen it myself.

Q. Does it have a couch on which the patient or customer reclines to have a treatment?

A. I understand it is a couch?

Q. Have you ever seen it? [117]

A. I have never seen it.

Q. Have you ever seen the one issued from Texas?

A. No, sir, I haven't seen any of these, other than just told exactly how they operate.

Mr. Harris: No further cross examination.

Redirect Examination

Q. (By Mr. Lyon): Mr. Stauffer, do the Stauffer salon tables, which you lease or rent to your franchise holders, bear serial numbers?

A. Yes, sir.

Q. And where is the serial number applied?

A. It is applied on this name plate.

Q. So then does that indicate to you anything as to whether or not each Stauffer table that has been distributed to the public had such a name plate?

A. It would have to in order to keep our records straight.

Q. A minute ago Mr. Harris suggested that you didn't have any other competition at the present time, except Slenderella.

Isn't it a fact that there are numerous people in the United States who own their own Rith-

(Testimony of Bernard H. Stauffer.)

Matic tables, who are offering reducing service to [118] the public, along the lines of the Stauffer System? A. Yes, sir.

Q. There is Marie Van Dusen in Las Vegas for one, isn't there? A. Yes, sir.

Q. And Mrs. Exely, whom you sued for using the name "Stauffer Tables", who was another one, wasn't she? A. Yes, sir.

Q. We have another instance of the same down in New Orleans, do we not? A. Yes, sir.

Q. In other words, those are just the ones that have been called to my attention. Are there any others?

A. Oh, I am sure there must be eight or ten more around the nation of a similar nature, where they own Rith-Matic tables and they don't operate under the Stauffer System franchise, but they are operating their own business.

Q. And we are having a little trouble keeping them from using the good name Stauffer, aren't we? A. Yes, sir.

Q. Mr. Stauffer, Mr. Harris suggested—I believe you agreed with him—that you are not a graduate chemist. But do you have any training in chemistry?

A. Oh, yes, I have the standard training in both high school and a short time in college. [120] I have about 35 years of research.

Q. What, if anything, have you done with respect to blood chemistry?

A. I was associated with a man who had exten-

(Testimony of Bernard H. Stauffer.)

sive training in that field, and when we developed the Stauffer System, and we were trying to arrive at the speed in which the fatigue acids were developed, we started at very high frequencies and it was necessary to make blood analysis to determine the amount of fatigue acids, to know when we would get the motion at the highest rate, yet without producing any fatigue acids. I have a world of experience in that respect.

Q. With respect to this question of mechanical engineering. Since 1938 you have been in the manufacturing business, haven't you? A. Yes.

Q. You have been the head of a rather extensive manufacturing plant, is that right?

A. Yes.

Q. And you have designed a good deal of that machinery, have you not?

A. Primarily, all of our designs were my designs.

Mr. Lyon: That is all.

Mr. Harris: No further examination, if the court please.

The Court: Call the next witness.

(Witness excused.) [120]

The Clerk: You have some exhibits.

Mr. Lyon: Are you going to offer 7 through 11?

Mr. Harris: I don't know what the court's pleasure is on my offering the exhibits during my opponent's case.

Mr. Lyon: I will offer them, too. They have

plaintiff's numbers. I have no objection to them.

Mr. Harris: We have no objection to them.

The Court: What is the foundation for them?

Mr. Lyon: These are name plates he cross examined the witness on.

The Court: They are received into evidence.

(The objects heretofore marked Plaintiff's Exhibits 7 to 11, inclusive, were received in evidence.)

Mr. Lyon: I don't believe A has been received.

Mr. Harris: I might at this time, if it is proper procedure, offer into evidence Defendant's Exhibits of the same letters, the drawings, Exhibits marked A-1, A-2, and A-3 for identification.

Mr. Lyon: No objection.

The Court: Received.

(The documents heretofore marked Defendant's Exhibits A-1, A-2 and A-3 were received in evidence.) [121]

DOUGLAS B. NICKERSON

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.

State your name in full, please.

The Witness: Douglas B. Nickerson.

The Clerk: How do you spell your last name?

The Witness: N-i-c-k-e-r-s-o-n.

The Clerk: Your address?

The Witness: 345 Blythe Road; B-l-y-t-h-e. In Pasadena.

(Testimony of Douglas B. Nickerson.)

Mr. Lyon: At this time, if the court please, I offer as Plaintiff's Exhibit 16 a print entitled "Exercising Machine for Slenderizing Systems, Inc." This was furnished to me by Mr. Harris at my request for a print illustrating the Slenderella machine.

Mr. Harris: No objection. We stipulate those are the facts.

The Court: It is received. This is the accused structure?

Mr. Lyon: Correct.

(The document heretofore marked Plaintiff's Exhibit 16 was received in evidence.)

Mr. Lyon: I next offer a print entitled "Sacro-Matic Inc." slenderizing machine, which has the [122] same history. It was furnished to me by Mr. Harris on my request for a drawing of the Slenderella Inc. slenderizing tables.

May it be stipulated, Mr. Harris, that you have informed me, and it is a fact, that there have been two types of tables manufactured and used by the defendant, and that the minor differences between the two are illustrated by these two separate drawings?

Mr. Harris: I think you misspoke yourself, counsel, but I am very glad to stipulate these two prints, Exhibits 16 and 17, illustrate tables which have been used by the defendant in this action.

Mr. Lyon: I see.

Mr. Harris: The defendant doesn't manufacture or sell anything.

(Testimony of Douglas B. Nickerson.)

Mr. Lyon: I will accept that. We offer these two, 16 and 17, in evidence.

The Court: Received.

(The documents heretofore marked Plaintiff's Exhibits 16 and 17 were received in evidence.)

Mr. Lyon: May I have 16, please, Mr. Clerk?

I had better qualify my witness, first, I guess.

Direct Examination

Q. (By Mr. Lyon): Mr. Nickerson, what is your technical education? [123]

A. I graduated from the California Institute of Technology in 1940 as a Bachelor of Science in mechanical engineering.

Q. Are you a registered engineer in the State of California?

A. Yes, I am a registered mechanical engineer.

Q. Is this the first patent infringement case in which you have ever testified?

A. No, it is not.

Q. It is the third, isn't it? A. Second.

Q. What is your present position?

A. I am assistant chief engineer for research and development for Hydro-Aire Incorporated, subsidiary of Crane Company.

Q. Prior to that, what was your position? Not at Hydro-Aire, but your previous employment.

A. I was previously employed by Aerojet Engineering Corporation in Azusa, as senior engineer.

(Testimony of Douglas B. Nickerson.)

Q. What is your experience, your personal experience with respect to patents?

A. Well, I have read some. I testified in a case for Lyon and Lyon on a latching mechanism.

Q. What I meant more than that is, do you have patents in your own name? [124]

A. I have a patent issued to me. I have an application for several more, and another application which is under secrecy.

Q. You are an inventor of at least several patents, is that correct? A. That is right.

Q. And you have had occasion to read and interpret patents, is that correct?

A. That is correct.

Q. As a matter of fact, didn't I give you about 80 of them just the other day, which you were supposed to go home and study?

A. That is right.

Q. At my request, have you made a study of Plaintiff's Exhibit 16?

A. Is this Plaintiff's Exhibit 16 (indicating)?

Q. That is. A. Yes, I have.

Q. Would you explain to the court what is illustrated in Plaintiff's Exhibit 16, as far as essential operating mechanisms? You don't need to worry about the frame and things like that.

A. Plaintiff's Exhibit 16 illustrates a table which is so arranged that it may oscillate, and an applicator supported from that table which also can oscillate. [125]

(Testimony of Douglas B. Nickerson.)

Do you want more detail than that? These are the essential elements of it.

Q. Well, you might point out the motor and the belts and things like that, and driving mechanism.

A. Each element is driven by an electric motor through a belt drive, and the cam is driven by the motor drive.

A connecting rod transmits the motion from the cam to a link, and the link in turn transmits the motion to a pad or table, as the case may be.

Q. Now, confining ourselves to the right-hand portion of the table, and particularly to Section Line CC, do you find a slot in the table?

A. There is a slot in the table, yes.

Q. Do you find an arm or pair of arms extending up through that slot?

A. That is right, there is an arm, or in this case there is a pair of arms up through that slot, which are connected together.

Q. I see. Those arms support applicators, is that correct

A. Well, applicators or pads.

Q. All right: Are those arms pivoted?

A. The arms are pivoted about a fulcrum point.

Q. I see. Now, what have you done in the way of making [126] a simplified model of the device shown in this?

A. At your request I made a Keno-Matic model to illustrate the motion of the table and the applicator.

(Testimony of Douglas B. Nickerson.)

The Court: What do you mean by "Keno-Matic?"

The Witness: A Keno-Matic model is one that illustrates the motion but not the forces.

The Court: Counsel, do I correctly understand that this litigation now involves only Claim 1 of the patent, of the Stauffer patent?

Mr. Lyon: That is quite correct, your Honor.

Mr. Harris: Yes, your Honor.

The Court: All right.

Mr. Lyon: I ask the clerk to identify this as Plaintiff's Exhibit 18.

(The object referred to was marked as Plaintiff's Exhibit 18 for identification.)

Q. (By Mr. Lyon): I now hand the witness Exhibit 18, and ask if that is the Keno-Matic model referred to? A. That is the model.

Q. I have got the right one?

A. You have got the right one.

Q. Will you point out to the court what happens in that model and compare it to what is happening in Stauffer patent No. 2,240,679, or what is disclosed in that patent?

Mr. Harris: If the court please, there is no foundation [127] laid with respect to the patent, so far as this witness is concerned.

The Court: I think that is correct.

Q. (By Mr. Lyon): Have you read the patent in suit? A. No, I haven't.

Mr. Harris: He hasn't even studied it, apparently.

(Testimony of Douglas B. Nickerson.)

Q. (By Mr. Lyon): I told you to do it.

A. I read the claims, but not the whole patent.

Q. All right. Explain what this does then. First, tell me what this model is.

A. This model demonstrates, or, illustrates the table here (indicating). This blue item illustrates the table (indicating).

Q. Just a second so the record will be clear. Plaintiff's Exhibit 18, is this the Keno-Matic model of Plaintiff's Exhibit 16? A. That is right.

Q. Now you can explain what the model shows.

A. The model shows in blue the table, and in red, the vertical red member is the applicator (indicating).

And the motion of the model illustrates the motion of the applicator and the motion of the table.

Q. Now, this vertically extending red member (indicating), is that the member that is indicated—in the table supports the applicator or pad? [128]

A. That is correct.

Q. Now, in the drawing, Exhibit 16, does this red member extend through a slot in the table?

A. Yes, it does.

Q. Actually, in the drawing, Exhibit 16, there are two such shafts running upwardly, is that correct?

A. They are actually one piece; they are two legs of the casting.

Q. Two legs. So you could say that picturewise you might take this as a section cut through here and looking this way (indicating). A. Yes.

(Testimony of Douglas B. Nickerson.)

Q. When I say "this" I mean this Keno-Matic model, Exhibit 18.

A. Keno-Matic model represents an illustration of the machine.

Q. I hand you now what has been identified as Plaintiff's Exhibit 17, and ask you to compare that with Exhibit 16 and——

First I will ask you, did you make a Keno-Matic model of Exhibit 17? A. Yes, I did.

Q. You did? A. Yes.

Mr. Lyon: I will ask the clerk to identify this as [129] plaintiff's next in order.

The Clerk: 19.

(The object referred to was marked Plaintiff's Exhibit 19 for identification.)

Q. (By Mr. Lyon): I will ask you if that is the Keno-Matic model of Plaintiff's Exhibit 17?

A. Yes.

Q. With those four exhibits before you, will you point out what is shown in Exhibit 17 and how that is illustrated in Exhibit 19?

A. The elements are essentially the same. In Exhibit 19 we have the upper structure, which I assume is a pad. The pad is not shown in Exhibit 17. But this is shown in green and has the same reciprocating motion.

Q. You mean the table is green, is that right?

A. The table—what I assume is the table. It is not defined on the drawing as a table.

And the upper, the vertical member or what is

(Testimony of Douglas B. Nickerson.)

assumed to be the applicator is also illustrated and has its reciprocating motion.

Q. It is in red, is that right?

A. It is in red.

Q. Compare the motion of the two red members of Exhibits 18 and 19.

A. The motion of the two members is very similar. [130] A slight difference exists because in Exhibit 18 the connecting rod moves about a horizontal line. Whereas, in Exhibit 19 the line is canted from the horizontal.

Q. What does that result in, a slight change in the motion?

A. That results in a slight change in the motion.

Q. Does that result in a change in which the motion is slightly greater off center in one direction than the other?

Mr. Harris: That is objected to, if the court please; leading and highly suggestive.

The Court: Overruled. It is, of course, but these presentations by experts in this type of matter are almost counsel on the witness stand, anyway.

I think that we are going to get the result of the leading interrogation whether we have it in the court room in that form or not.

Mr. Harris: I agree, your Honor.

Mr. Lyon: I will withdraw that question.

Q. I will ask you to describe the motion and how it differs in these two Keno-Matic models.

A. Well, with respect to the vertical member or applicator—

(Testimony of Douglas B. Nickerson.)

Q. That is all I am interested in.

A. —the Exhibit 18 will have an essentially pure [131] sine motion about the vertical.

The Court: A what?

The Witness: An essentially pure sine wave motion about the vertical.

The Court: How do you spell that "sine?"

The Witness: S-i-n-e.

The Court: I want to be sure we have our record correct.

Q. (By Mr. Lyon): By that you mean it will transverse an arc substantially the same—

A. On either side of the vertical.

Q. On either side of the vertical?

A. That is correct.

Q. Is that true of Exhibit 19?

A. Exhibit 19 will not be quite evenly distributed about the vertical, due to this distortion, due to the connecting rod not being horizontal.

Q. Due to the slight angle which the connecting rod bears to the horizontal? A. Right.

Mr. Lyon: You may cross examine.

Excuse me. Have these Keno-Matic models been received in evidence?

The Court: I don't think they have been received.

The Clerk: No, your Honor.

Mr. Lyon: I would like to offer them. [132]

Mr. Harris: They are objected, if the court please, on the ground there is no foundation laid

(Testimony of Douglas B. Nickerson.)

they correspond to what is shown in these drawings; they are incompetent and irrelevant.

Mr. Lyon: If I haven't asked the witness that, I will ask him.

The Court: All right.

Q. (By Mr. Lyon): Did you do the best you could to make a Keno-Matic model which would represent and would depict Exhibits 16 and 17?

A. Yes, I did.

Q. And as a matter of fact, you made one mistake, didn't you, and had to go back and correct it?

A. That is correct.

Q. Do, in your opinion, Exhibits 18 and 19 respectively make a Keno-Matic showing of the action of Exhibits 16 and 17?

A. In a qualitative way, yes.

Mr. Lyon: I renew my offer of Exhibits 18 and 19.

Mr. Harris: Same objection.

The Court: Overruled. They are received.

(The objects heretofore marked Plaintiff's Exhibits 18 and 19 were received in evidence.)

Cross Examination

Q. (By Mr. Harris): Mr. Nickerson, these Keno-Matic models, as you call them, Exhibits 18 and 19, are not made to scale, as shown in these drawings, are they?

A. They are scaled from the drawing, yes, sir.

Q. Let's look at that. What scale?

A. As close as I can ascertain I attempted to

(Testimony of Douglas B. Nickerson.)

make them full scale. The drawings show a scale on them, or a dimension, and working from that information I attempted to make the models to be life size or full scale.

Q. That is with respect to what parts of the model? A. With respect to the motion.

A. With respect to the motion.

Q. Well, there is no motion shown on the drawings, is there?

A. It is indicated by the nature of the drawings.

Q. Are the parts on these models made to full scale?

A. As close as I could ascertain from scaling a drawing, yes.

Mr. Lyon: Except for the length of the table, you don't mean to indicate that?

The Witness: Excuse me. The mechanism is made to scale. I foreshortened the table, obviously.

Q. (By Mr. Harris): What mechanism are you referring to in these models? [134]

A. The cams, the connecting rods and the linkages.

Q. And the relationship between those cams, connecting rods and linkages, and the top of the table? A. Yes.

Q. Just how did you go about doing that, Mr. Nickerson?

A. I laid the drawings out on a drafting table, and in one case I took the scale factor from the drawing.

(Testimony of Douglas B. Nickerson.)

In another case the drawing was dimensioned, and I used that as a basis.

And by means of a pair of proportional dividers laid out the length of the various linkage elements. From the layout of the linkage elements I cut out pieces of plywood to simulate them.

The location of the fulcrum point and the length of the connecting rods, as shown here, and the length of the applicator bar are taken—scaled from the drawing by proportional dividers.

Q. How did you cut them out of plywood, was it with a bandsaw or something?

A. Yes, by bandsaw.

Q. Then did you check the dimensions of those parts after you cut them out against the drawings again?

A. I want to make one point clear at the outset. The outside, contrary to these parts, is not the pertinent part. The distances between fulcrum points are important. [135]

These were carefully laid out with these dividers and spotted in with a drill press, so that the distances are appropriate, as close as I could determine from the drawings.

Q. But the question is, did you check the parts, dimensions of the parts against the drawings after you had made the parts?

A. Yes, sir, by the same method as I did before.

Q. There is in the defendant's table, illustrated by the drawing which is Plaintiff's Exhibit 17—strike that and I will start over again.

(Testimony of Douglas B. Nickerson.)

Which view, if any view on this drawing, did you use in making one of the Keno-Matic models?

A. The view shown as Section BB and Section CC.

Q. And what is the Section BB in this drawing?

A. The Section BB shows the mechanism which oscillates what I think is the table. It isn't shown as a table on the drawing, so I can't identify it positively.

Q. Did you ever see any table such as is shown in this drawing, Plaintiff's Exhibit 17?

A. No, sir.

Q. You say that the part that you have just described, which I take it is the part shown in Section BB on the drawing, is used to vibrate or oscillate the whole table? A. It appears to be so.

Q. The top of the table or the table including the [136] frame?

A. It appears, the top—to oscillate the top only, if this is a table; it isn't shown in this drawing clearly. If we could use the other one, it illustrates the table, and we could be more clear.

Q. You refer to a table as being the blue member illustrated in these or included in these Keno-Matic, or, the Keno-Matic, Exhibit 19.

What part of that is the table? Is it the whole thing or is it the top of it, or what are you referring to?

A. Well, this blue member (indicating) illustrates or is intended to represent the table structure.

The table structure is a frame and it includes

(Testimony of Douglas B. Nickerson.)

brackets, on which a motor is carried and on which the applicator fulcrum is carried, and the applicator cam is carried.

Q. And this mechanism shown by the Section BB in the drawing, Plaintiff's Exhibit 17, which is the mechanism shown on the left in the model, Exhibit 18, that has nothing to do with the operation of or the motion of the applicator shown in the middle of the exhibits, does it?

A. Exhibit 17 has nothing to do with Keno-Matic model 18.

Q. Excuse me. We are working on the wrong model. We will get the right model.

I put before you the model which is Exhibit 19, which, [137] as I understand it, you say corresponds to the drawing, Exhibit 17?

A. That is correct.

Q. All right. Now, my understanding is that this mechanism on the left of the model, Exhibit 19, is taken from the Section BB on this drawing (indicating)?

A. That is correct.

Q. And that mechanism has nothing whatever to do, does it, with the operation of the red object, the upstanding arm in the middle of the model?

A. That is correct.

Q. Why did you include that in this model, if it has nothing to do with the operation of the applicator arm?

A. I was asked to make a Keno-Matic model of the machine, not of a specific part of it.

Q. This does not show all the machine, does it?

(Testimony of Douglas B. Nickerson.)

A. It shows the—well, it is a representation of the motions through which the machine goes, and all of the motions.

Q. Now then, in making the parts of the model, Exhibit 19, which are in the center of the model, the upstanding red piece of wood here (indicating), with the rod connected to it in blue (indicating), what did you use, what view of the drawing, Exhibit 17, did you use to make that from?

A. Section CC. [138]

Q. Section CC? A. Yes (indicating).

Q. How did you get the length of the connecting rod for the model in that mechanism?

A. By a set of proportional dividers, and multiplying the length by four. Section CC is indicated as a scale of one-quarter of an inch to an inch.

Q. In talking to you about this model making job, Mr. Nickerson, did Mr. Lyon indicate to you that he wanted these models, so far as possible, to have an applicator arm which moved on one side of the vertical?

A. We discussed this one side of the vertical to some extent, although I can't say that he asked me to lead the model in one direction or another.

We discussed the results of making the model and of studying the drawing.

Q. A small difference in the location of the pivot point for the red upstanding applicator arm makes quite a difference in the arc of movement of that arm relative to the vertical, does it not?

A. Yes, it will make some difference.

(Testimony of Douglas B. Nickerson.)

Q. And the same thing is true as to the location of the pivot point for the little crank that you have put on here in lucite? A difference in the location of that pivot point, even in a small amount, changes materially the arc [139] arrangement in which the red applicator arm moves, does it not?

A. To a lesser degree, yes.

The Court: I don't see these fine points of whether it does or does not are involved here in determining whether Claim 1 of the patent is or is not infringed.

You might enlighten me, if I am just dense in not getting your point, but I can't see what you are driving at because it doesn't seem that Claim 1 relates at all to this subject, as to the fine points of it.

Mr. Harris: This is merely cross examination because I don't think this model corresponds with the drawing. I am attempting to bring that out. It doesn't—

The Court: You may go ahead. I just didn't see that even if you traveled the entire length of this road it would be getting us anywhere in our lawsuit.

Mr. Harris: Well, it is a question, your Honor, of what type of movement the plaintiff has in his patent, what kind of movement the defendant has in its tables. That is one of the main issues in the case.

The Court: Well, it says the “* * * applicator is adapted to tiltingly move, and means to oscillate said applicator axially * * *” and so on.

(Testimony of Douglas B. Nickerson.)

It doesn't get down to the refinements that either of you have been laboring in the examination of this witness. [140]

Mr. Harris: Well, the specification——

The Court: If it does, I just don't see it there.

Mr. Harris: The specification is very plain in this patent, if the court please. The specification, with regard to the movement of the vertical support 20 in the patent, or the upstanding support, it says that “* * * the degree of movement ranges from about minus 15 to minus 5 degrees from the vertical, thereby causing the manipulator to swing through a range of 10 degrees, during which interval the seat or manipulator support 20 at no time passes the vertical, * * *”

This patent teaches at no time does this support for the seat or applicator come up to the vertical itself, always on one side of the vertical in a range as shown in the dotted lines in the drawing of the patent, and as I have read here in column 2, top of column 2 on page 2 of the patent.

In other words——

Mr. Lyon: That, I submit, pertains entirely to Claim 2 of the patent and has nothing to do with Claim 1.

The Court: You have been reading this first part of the patent and the small portion I read to you is indicative of the incapability of what you were going into was from the claim, and the suit, of course, is upon the claim.

Mr. Lyon: That is correct. [141]

(Testimony of Douglas B. Nickerson.)

Mr. Harris: But the court please, the law tells us we must interpret the claims in the light of the specifications and the drawings. We must refer to the specifications and drawings to interpret the claim.

Whereas here, the plaintiff has limited his specification and his drawing by the amendment he made to them, to be very specific in this type of movement we are just talking about now.

It is our position that by doing so he is estopped now from contending, from any interpretation of these claims to cover any other movement, any broader type of movement.

Mr. Lyon: I would like to see some authority that holds there is any estoppel ever created by an amendment to the specification, as distinguished from an amendment to a claim.

Mr. Harris: Well, that is a matter of argument, of course.

The Court: You mean you are challenging the existence of such. You wouldn't really like to see it.

Mr. Lyon: Judge, you put the words right in my mouth.

Mr. Harris: No, if the court please, there is an argument in here, there will be an argument in here as to just how the devices operate, and whether or not these models that the plaintiff has produced do correctly show the operation of defendant's [142] structure, because we shall contend they do not. I wish to cross examine this witness at some greater length on this.

(Testimony of Douglas B. Nickerson.)

The Court: My instituting this colloquy was simply to get myself educated as to the direction or what you were aiming at in the cross examination, because I was beginning to fail to follow you.

Mr. Harris: Thank you, your Honor. I am very pleased to have an opportunity to speak to it.

The Court: These little colloquies are not to be taken as indicative of the court having a view one way or another, as to the ultimate merits of the litigation.

Mr. Harris: I understand. I am going to be quite a little while longer with this witness. It is now after the time your Honor indicated you wished to close. I don't wish to keep your Honor here. If you wish to recess now, we will be glad to.

The Court: If this is an opportune time, we will do so. I thought we would stay a little later, because as usually happens we taken a recess contemplating ten minutes and some lawyer comes in and the recess extends to thirty. I think we got by today with about twenty, however.

Mr. Harris: Whatever your Honor's pleasure is, of course.

Mr. Lyon: May I ask, Mr. Harris, about how [143] much longer Mr. Nickerson will be on cross examination.

He has another job he would like to get back to. He would like to have some idea when he can get back.

Mr. Harris: I think it will be fifteen or twenty minutes more, certainly.

(Testimony of Douglas B. Nickerson.)

The Court: If it is that brief, let's take the fifteen or twenty minutes now.

The Witness: Thank you.

Q. (By Mr. Harris): In making these models you have I notice indicated some notches on the right hand blue connecting rod member of Exhibit 19.

What do those correspond to?

A. Those correspond to the notches shown in Section CC for that same member, right here (indicating).

Q. And from Section CC, how do you tell the length of the connecting rod arm? It is broken in Section CC, is it not?

A. The length of the connecting rod is shown in section, in Section CC. In other words, you can scale it. This is a true view, taken looking at the side view of the connecting rod (indicating).

Q. In Section CC the connecting rod is actually broken there by lines, is it not,—

A. That is correct.

Q. —to indicate that something else is in [144] there besides what is shown? It is a foreshortening, isn't that the conventional way—

A. Possibly so. However, as closely as I could ascertain the axis distance is the same on CC—is represented the same, excuse me, on Section CC as it is in the plan, of the top view of the mechanism.

Q. Now, the fact is that in this machine shown by Plaintiff's Exhibit 17 there is not one, but there

(Testimony of Douglas B. Nickerson.)

are two vertical arms on the top of each of which is an applicator pad? That is a fact, is it not?

A. This is a fine point. Actually, there are two legs of a common arm. They are all one single weldment.

See, this one is welded on here and this one is welded on here (indicating). It is a single element of the machine; however, there are two legs.

Q. And on the top of each of those two legs there is a separate pad support, is there not?

A. In this drawing there are no pads shown.

Q. But a pad support?

A. Well, possibly. There is a——

Q. I call your attention to Section CC, the item that is indicated in the small square as "S.A. D." on the top of the arm. That is the support pad, is it not?

A. I have no way of knowing that. I assume it is.

Q. There is nothing in this model, which [145] is Exhibit 19, to indicate that the two pad supports, which are parallel, as you just described them, may be operated in unison or oppositely, is there?

A. Yes, there is on the drawing, Exhibit 17. The drawing indicates that both of these vertical members are welded to a common tube.

Q. So then it is your conclusion that both of these members, the vertical members, do not operate in unison? A. I assume so.

Q. And that they cannot operate independently in opposing operation? A. That is correct.

(Testimony of Douglas B. Nickerson.)

Q. Do you find any indication on that drawing, Exhibit 17, of any timer to control the sequence of operations of that mechanism? A. No, sir.

Q. And in this mechanism, illustrated by the drawing Plaintiff's Exhibit 17, there are two slots in the top of the table, are there not?

A. Exhibit 17 has no slots because it has no table.

Q. Oh, you don't consider—

A. This is only a structure around on which you might bolt a table.

Q. There is no table shown in this drawing at all? A. Not on 17, no sir. [146]

Q. And then in Exhibit 19, do you indicate any table there?

A. We represent the table structure, if you will, what is assumed to represent the table if it were shown on the drawing.

Q. But you cannot tell from Exhibit 17 whether the defendant's structure has one slot or two slots, can you? A. No.

Q. You can tell, however, that it does have two applicators in the structure in the center?

A. This is a fine point. There are two legs on a common member. Now, whether that represents two or not, I don't think—I don't know.

I don't think it does. If I designed a structure and it had two extensions on it, it would still be the same piece of mechanism.

Q. But that is because you have never seen one

(Testimony of Douglas B. Nickerson.)

of these actual tables, according to this drawing, and therefore you don't know, is that correct?

A. Well, I have never seen one of these tables, and from the drawings I can't state whether or not it has two or one pad, actually.

Q. Now, going to the other drawing which is Exhibit——

Mr. Lyon: 16.

Mr. Harris: I don't find any marking on this drawing. [147]

The Witness: Here it is (indicating).

Q. (By Mr. Harris): Oh, yes. Exhibit 16, which you say corresponds to Exhibit 18,—is that correct?

A. I think that is right. Yes, this corresponds to 18.

Q. Now, in the construction shown in the drawing, Exhibit 16, it definitely shows two slots through which the upstanding applicator arms extend, does it not? A. Correct.

Q. And it shows two sets of double applicators, one on each of those arms, does it not?

A. That is correct.

Q. And those applicators in the defendant's machine, shown by Exhibit 16, are not on the longitudinal axis of the machine, are they?

A. Pardon me. Would you repeat that again?

Q. Well, I will just restate it. Neither of the applicators or pads, nor sets of applicators or pads in the mechanism shown in Exhibit 16 are on the longitudinal center line of the table or machine?

A. That is correct.

(Testimony of Douglas B. Nickerson.)

Q. Now, from this drawing, Mr. Nickerson, can you tell us how this machine operates, whether these pads or paddles operate together or whether they operate in opposition, or how they operate?

A. It is not possible to determine from this drawing.

Q. Also, there is no timer shown in this drawing, is there?

A. I didn't look for that. Let's see. No, no timer here, so far as I can ascertain.

What is that (indicating)? Well, unless it is this control switch (indicating). There is a control switch shown.

Q. And in the making of the model, which is Exhibit 18, the same things apply, do they not, which you said applied to the making of the model, Exhibit 19, insofar as the location of the various pivot points and the length of the members is concerned?

A. That is correct.

Mr. Harris: No further cross examination, your Honor.

The Court: Redirect?

Mr. Lyon: A couple of questions.

Redirect Examination

Q. (By Mr. Lyon): Mr. Nickerson, in the making of these models, Exhibits 18 and 19, did I give you any instructions about the necessity of being very careful?

A. Yes, you did. You wanted to be very careful to truly represent the motion. [149]

(Testimony of Douglas B. Nickerson.)

Q. And after you had delivered these models to me, did I ask you to make a re-examination of the drawings to be sure they were actually correct, insofar as you could make that correct?

A. This was the intent. We discussed the motion, as represented on the drawings, and as shown on the model.

Q. When you delivered the model to me in the first place, the model of Exhibit 18, you had this crank arm on the left—

A. Connecting rod.

Q. —this connecting rod on the left (indicating) on the right, and the one on the right on the left (indicating)?

A. That is correct.

Q. How did you discover that mistake?

A. By rechecking the drawing.

Q. How come you were rechecking the drawing?

A. You asked me to.

Mr. Lyon: That is all.

Mr. Harris: Nothing further, your Honor.

The Court: May this witness be excused?

Mr. Harris: Certainly.

(Witness excused.)

The Court: Will 1:30 be a convenient time tomorrow?

Mr. Lyon: 1:30? [150]

The Court: Yes.

Mr. Harris: Yes, your Honor.

The Court: The court is recessed until tomorrow morning at 9:30. This case until 1:30 tomorrow.

(Whereupon, at 4:30 o'clock p.m., Wednesday, November 14, 1956, an adjournment was

taken to Thursday, November 15, 1956, at 1:30 o'clock p.m.) [151]

Thursday, November 15, 1956; 1:35 p.m.

The Court: Are you ready to proceed?

Mr. Lyon: The plaintiff has concluded its prima facie case.

Mr. Harris: First, if the court please, I produce a certified copy of the file wrapper and contents of the Stauffer patent in suit, No. 2,240,679, which is offered into evidence as Defendants' Exhibit B-1.

The Court: It will be received.

(The document referred to was received in evidence and marked Defendants' Exhibit B-1.)

[See Book of Exhibits.]

Mr. Harris: Next, if the court please, I produce a certified copy of a document entitled "Search Sheet" with regard to Patent 2,240,679, which I ask be marked as Defendants' Exhibit B-2.

I offer that in evidence as Defendants' exhibit of the same designation.

Mr. Lyon: On what basis?

Mr. Harris: This indicates the field of search of the Patent Office in connection with the application for the Stauffer patent in suit.

Mr. Lyon: I don't know whether you can prove anything that way. This, your Honor, is merely the examiner's notes in the file. It is nothing that was communicated to the defendant. [155]

It is not part of the prosecution of the patent. It is wholly as if we went back to the Patent Office and found a piece of paper with some scribbling on it in the examiner's handwriting.

The Court: This is not a review of the examiner's work, and——

Mr. Harris: Yes, your Honor, it is. I beg your pardon.

The Court: I understand that it is an independent determination of the validity of the patent in which the fact that the patent has issued is prima facie evidence of its validity, and that the prior art, which might have escaped the patent examiner's attention, is accorded kind of a different category in our weighing the evidence than the prior art which he did consider.

Mr. Harris: Yes, your Honor.

The Court: But I have never had his work papers brought in here.

Mr. Lyon: I have been practicing patent law for 20 years, your Honor, and this is the first time anybody has tried to put something like this in evidence in my cases.

The Court: It might be valid, counsel, but it is a point of novelty in this department, at least.

Mr. Harris: I think there is no question of admissibility, your Honor. I think it is clearly [156] admissible under the statutes. It is an official document and a certified copy of an official document. I think the question is the weight to be accorded by the court——

The Court: Even official documents must have relevancy to the case.

Mr. Lyon: That is correct.

Mr. Harris: This has relevancy to the examination made by the Patent Office in considering the

application for the Stauffer patent in suit. This is relevancy.

The Court: Have you seen it, Mr. Lyon?

Mr. Lyon: Yes, I have seen it, your Honor. As I say, it is just the same as if—there is a word here under “Examiner” of “Miles”.

We have no way of knowing what that means. This is just his notation of the work he has done.

The Court: Actually, is this a review of his determination in the way that, say, we review the referees in bankruptcy? There we act rather as an appellate court.

Mr. Lyon: No, your Honor, this is not.

The Court: I have understood that a trial of the validity of a patent is not comparable to a review from any one of the many commissioners or special bodies, finders of fact, whose opinions we do review.

Mr. Harris: Of course, we are not making any contention on that score. We are simply suggesting [157] that this document is relevant to show the field which the examiner searched when he considered this application for the patent in suit. It is a part of the official records of the United States.

It shows he did not consider the field of search in which two of these prior art patents are located.

Mr. Lyon: The file wrapper of the patent in suit is admissible, your Honor, on the ground that it shows the negotiations leading up to the grant.

The Court: It was admitted, wasn't it?

Mr. Lyon: Pardon?

The Court: I have admitted it.

Mr. Lyon: That is right. And he is attempting to supplement the file wrapper by showing what was in the mind of one of the parties, uncommunicated to the other.

The file wrapper comes in because it is communicated, it is acts between the parties. This is a totally unilateral document.

The Court: Kind of a work sheet?

Mr. Lyon: Exactly, it is a work sheet.

Mr. Harris: It is a work sheet. It is part of the records of the United States Government, and I think it is admissible clearly. It is a question of relevancy.

The Court: If it is clearly admissible you will have no trouble finding a case which so holds.

Until such a case is produced, I believe it is [158] inadmissible, although it is certified.

Mr. Harris: Very well, your Honor. May we have it marked for identification?

The Court: Surely. Tell us what number.

The Clerk: Defendants' B-2 for identification.

The Court: Thank you.

(The document referred to was marked Defendants' B-2 for identification.)

Mr. Harris: I might say at this stage I particularly call the court's attention to pages 13 and 24 of the file wrapper of the Stauffer patent in suit.

The page numbers, your Honor, are written in pencil on the bottom of each page. I particularly call your attention to pages 13 and 24.

Page 13 being the original drawing filed by Mr. Stauffer with his original application. Page 24 be-

ing the presentation of the predecessor of Claim 1 of the patent in suit.

In other words, page 24 of the file wrapper shows Claim 1 as it was originally submitted to the Patent Office as Claim 10 of the application. That claim on its face, as so submitted on page 24 of the file wrapper, shows the amendments which the applicant, Mr. Stauffer, made to claim 10 before the Patent Office would allow the claim.

We are suggesting that those amendments are [159] very material to this issue here.

The Court: I made a note of those pages. Do you want me to examine it now in order to better understand other evidence that comes in, or may I—

Mr. Harris: No, your Honor, not now, thank you.

The Court: All right.

Mr. Harris: Next, if the court please, I produce a photoprint copy of page 1286 of the Official Gazette of the issue of September 29, 1931, which I ask be marked as Defendant's Exhibit B-3 for identification.

(The document referred to was marked Defendant's Exhibit B-3 for identification.)

Mr. Harris: I offer this into evidence at this time.

Mr. Lyon: On what theory.

Mr. Harris: This is also a copy of the official publication of the United States Patent Office. It shows an abstract of the Gunderman patent, No.

1,825,588, upon which we are relying here in this case as a defense.

It shows the search classes in which this patent is located in the Patent Office records, which does not appear on the face of the Gunderman patent itself.

The Court: Well, even if the patent examiner in this Stauffer case had found that patent and had determined that it was not an anticipation of this present patent, if this court felt that it were, it wouldn't make any difference, would it? [160]

Mr. Harris: It wouldn't make a bit of difference, that is correct. I am probably going through these two exhibits in excess of caution, so far as the record is concerned.

The Court: It seems to me that caution just hangs onto use with a great deal of force, or a great deal of weight.

Mr. Harris: At any rate, we think the last exhibit, Exhibit B-3 for identification, is clearly admissible and relevant, both. We offer it.

Mr. Lyon: I certainly object to it. I know of no theory on which——

You do intend to offer the Gunderman patent itself, do you not?

Mr. Harris: Oh, certainly. As I say, the search class in which the Gunderman patent is located does not appear on the face of the Gunderman patent.

The Court: It is rejected, that is, this particular exhibit, the Gazette, is rejected without prejudice, and if you have some authority, some court, to the

effect it should be admitted, then I will reconsider the offer.

Mr. Harris: Thank you, your Honor.

Next, if the court please, may I call Mr. Knapp to the stand. [161]

ROBERT T. KNAPP

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please take the stand.

Will you state your name, please?

The Witness: Robert T. Knapp.

The Clerk: How do you spell your last name?

The Witness: K-n-a-p-p.

Direct Examination

Q. (By Mr. Harris): What is your residence address, Mr. Knapp?

A. 1801 North Country Lane, Pasadena, California.

Q. Do you have any interest, financial or otherwise, in the outcome of this case? A. I do not.

Q. What is your present occupation?

A. I am professor of hydraulic engineering in the mechanical engineering department in the California Institute of Technology.

Q. How long have you been employed by the California Institute of Technology?

A. Since about 1922.

Q. Will you state briefly and generally some of the courses which you have taught at the University or Institute?

(Testimony of Robert T. Knapp.)

A. I have taught mechanical drawing, mechanism, [162] applied mechanics, strengthen materials, thermodynamics, hydraulic and power plant laboratories and hydrodynamics. I think that is the general ones.

Q. Dr. Knapp, what is your academic background, briefly?

A. I studied for about three and a half years at the California Institute of Technology and then went back to the Massachusetts Institute of Technology for a bachelor's degree in mechanical engineering.

Q. When did you receive that?

A. That was in 1920.

Q. Then what did you do?

A. Then I was asked to return to the California Institute in 1922 as instructor, and during the time I was instructor I also studied for the doctor of philosophy degree in mechanical engineering.

Q. Did you receive such a degree?

A. Yes, received it in 1929.

Q. Dr. Knapp, are you listed in any national directories?

A. Yes, in Who's Who in Engineering, American Men of Science, and the general Who's Who.

Q. By the latter you mean Who's Who in America?

A. Who's Who in America; excuse me.

Q. Are you a member of any national, [163] professional or honorary societies?

A. I am a member of the American Society of

(Testimony of Robert T. Knapp.)

Mechanical Engineers, the American Society of Civil Engineers.

I am a fellow of the American Physical Society. I am a member of the American Geophysical Union, and some of the engineering honorary societies, Alpha Beta Phi and Sigma Psi.

Q. During the last 20 years have you had any practical experience in applied engineering?

A. I had an opportunity to do considerable consulting work on quite a wide variety of subjects with engineering and government firms, government departments.

Q. In general, what practical experience have you had in the design or building of machinery?

A. In some of the consulting work I have had to design and supervise the construction of special equipment.

My main interests have largely been in research in engineering, and as such I have had to design and supervise construction of considerable large scale apparatus and also precision instruments, optical instruments and mechanical instruments.

Q. Have you had any experience or are you familiar with United States Letters Patent?

A. I have taken out a few patents at the request of some of the people I have done consulting work for. And I have had some experience in studying patents of others. [164]

I do have a speaking acquaintance—not a very liberal one—with patent literature.

(Testimony of Robert T. Knapp.)

Q. You say you have taken out patents. What do you mean by that?

A. Well, I mean that I have applied for patents on devices and the patents were granted on machines and on instruments.

Q. Are you a patent attorney, yourself?

A. No.

Q. You haven't acted as a patent attorney for others, have you? A. No.

Q. Are you familiar with the Stauffer Patent No. 2,240,679 involved in this action?

A. I have read the patent.

Q. Do you have a copy before you?

A. Yes, I think I can find it in here.

I am sorry, but it must be mixed up with some of this other literature. Oh, yes.

Q. Will you kindly describe briefly what this patent relates to and the construction shown in it?

A. The patent drawings are labeled "Muscle Relaxing Machine". The Figure 1, I believe the most of it is shown on the large diagram on the board. Figure 1 shows the couch with a person lying on it for treatment. [165]

Figure 2 is a vertical section of the operating mechanism of the applicator or paddle. This consists of a support projecting upward from a pivot on the base.

Q. Excuse me. What is the support number?

A. The support number is 20. Pivoted—the bearing, I think, labeled 22, which is carried on

(Testimony of Robert T. Knapp.)

what appears to be a piece of chanel iron labeled No. 4, which is fastened to the frame 26.

Mr. Lyon: Excuse me, Doctor. May I inquire, that handwriting on that patent, is that your own handwriting?

The Witness: All the notes on all the patents are in my own handwriting.

Q. (By Mr. Harris): Now, will you please continue your description of Figure 2 of the Stauffer patent in suit?

A. At the top of this arm 20 there is a pad or a table—well, let's say a tablet—fastened to it at what appears to be 90 degrees.

Q. What is that number?

A. That is No. 18. To see the details of the mechanism which oscillate the structure we have to go to Figure 3, because some of it is concealed by Figure 2 by the member being in front of it.

The same numbers, I believe, are carried on Figure 3, with additional ones from the other members. This is oscillated through a rather complicated linkage. [166]

Arm 28 goes from this support member to a pivot point 30 (indicating).

Q. Excuse me, Dr. Knapp.

A. Could I use that drawing (indicating)? I think it is an identical copy?

Q. I think this would be a little more satisfactory in explaining it to the court, to use this enlargement of Figure 1.

The Court: It certainly is easier to follow you

(Testimony of Robert T. Knapp.)

on that one, because you can point. It is kind of difficult to follow on the soft copy.

The Witness: Here we have this support member with a table (indicating).

Now I would like to see how it is fastened on here, and we go down to this member and see that at this point, which is here concealed, we have a pivot point (indicating) and a connecting rod or pitman coming over to this pivot point 3 (indicating).

Q. (By Mr. Harris): What is that connecting rod numbered?

A. That is No. 28, and the pivot point is numbered 30.

Now, this is a junction of three members (indicating), a link 32, which is numbered only up here (indicating),— That is common at the point 30 and comes over to a fixed support, which is here numbered 36 (indicating). [167]

And here 36 seems to go to the base, but it must be this vertical support which carries the other end of the link 32 (indicating).

Also, at the pivot point 30 is connected the projecting link of an eccentric strap, which goes around the eccentric cam—I prefer the word “eccentric”—No. 40.

Q. What is that link numbered in Figure 3, please?

A. The link is not numbered in Figure 3. We have to go back and forth between the two to get all the numbers.

(Testimony of Robert T. Knapp.)

The eccentric strap is numbered 38 in both figures. This eccentric is carried on a shaft numbered 42 on bearings, which are carried on a base. The bearings are numbered No. 44.

This same shaft carries a pulley (indicating), I believe No. 48, which is with a belt connected to the motor No. 50, so that the motor No. 50 drives this shaft No. 42 together with the eccentric (indicating).

The eccentric strap, that is moved by the eccentric or cam, then oscillates point 30, which is constrained to move in a circular path by this little link 32 (indicating).

That then transmits the motion to the link 28, which is nearly at 90 degrees to the motion of the eccentric, and this in turn oscillates the support 20 (indicating).

There is a spring in between some of the parts, of the fixed parts and the arm 20, I presume, to [168] take out slack and keep the bearings tight.

Q. What does the Stauffer patent in suit teach with regard to movement of the upstanding arm or support 20?

A. Well, if I read the specifications of the construction, it teaches that the arm 20 could be constrained to move in an arc, which lies wholly on one side of the vertical.

Q. Is that arc shown in the drawings?

A. Two positions are shown, the solid one and the dotted one, both of which are on one side of the vertical.

(Testimony of Robert T. Knapp.)

The description also teaches that that inclination should be toward the head of the patient.

Q. Dr. Knapp, have you made any study of the type of motion that is imparted by this mechanism of the patent in suit to the support 20?

A. Yes, I made a little analysis of the mechanics of the motion, in order to try to understand some of the other description and claim material found in the patent.

Q. Will you describe the conclusion that you came up with on that?

A. The reason I made the investigation was because I found the statement in the patent that this applicator or paddle had "more effect" when moved in one direction than the other.

And since, obviously, the motion is repetitive, the actual motion must be the same in both directions. [169] So I tried to find out what was meant by "more effect," and I thought possibly it was this rather complicated linkage down here (indicating), so I simply made on the drawing board a rough, very rough sketch, rough determination with compass to determine the relative motion of this arm 20 with respect to time, as compared with the motion of the shaft with respect to time, which we assume is a constant motion.

In doing this it turns out that this motion of the arm 20 is something like the quick return motion on a shaper. In other words, it moves faster in one direction than it does the other.

So that although this deviates only comparatively

(Testimony of Robert T. Knapp.)

small amount from simple harmonic motion, it does give a quicker motion in one direction than the return, and therefore might be what is meant by the patent in saying it had more action in one direction than the other.

Q. In which direction does it give a quicker motion?

A. I have to look at my sketch to be sure of that.

What I did here was to lay out on the drawing to the best I could scale from the patent drawings the points of motion of these three pieces of the linkage.

Then giving them numbers on the 30-degree points clear around the full 360-degree circle, I carried this motion across to the final point—I don't believe it is numbered—on the arm 28, where it connects to the support 20. [170]

The most rapid point of motion seems to be point 5 to 11. It seems to be on the forward point, on the forward half of this motion toward the head and the first half of its return from the head.

In other words, coming over slowly and speeding up and coming back and then going slowly the second half.

Q. What do you call a study of that kind? Is it a time motion study?

A. No, I would say it was a Keno-Matic study of the motion of the parts.

Q. Now, what does the Stauffer patent in suit, so far as the specification is concerned, teach to

(Testimony of Robert T. Knapp.)

you as to the extent of movement of the support 20?

A. In the specifications it defines this rather carefully on the bottom of page 2 in the first column.

Q. Would you please read that portion you refer to?

A. Yes, it begins, I think, about line 72 in the first column, or, 71:

“Operation of the machine causes the member 18 to be oscillated upon its hinge at 21, carrying the member forward and upwardly, due to radius of the arm of movement, for as will be noted from the drawings, the degree of movement ranges from about minus 15 to minus 5 degrees from the vertical, thereby causing the manipulator to swing through a range of 10 degrees, during which [171] interval the seat or manipulator support 20 at no time passes the vertical, hence movement imparted to a body lying thereon is accentuated in that its greatest thrust or lift is in one direction only, the return movement being a lowering and receding movement as distinguished from a positive upward and forward lift.”

Q. What is the subject matter at the top of column 1 on page 2? Does that have any relation to this?

A. This is also a description of the—we have to go to the bottom of page 1 and start this where it discusses this seat 18, which I have been calling an applicator or a paddle.

Q. Would you read the portion you refer to?

(Testimony of Robert T. Knapp.)

A. "A padded structure in the form of a seat 18 is fixedly positioned upon legs 20 which are oscillatably positioned upon bearings 22 secured upon a transversely positioned member 24, which is in turn suitably secured to the frame 26 of the couch 10. The legs 20 as will be noted in the drawings, are inclined toward the head A of the couch, the degree of inclination being relatively small, being of a probable maximum of 15 degrees from the vertical when in extreme forward position and approximately 5 degrees from the vertical when in the other extreme end stroke position. This arrangement causes the seat 18 to lie at a constant [172] although variable angle with respect to the upper surface of the couch."

Q. Dr. Knapp, what does that last phrase mean to you, that phrase which says, "* * * a constant although variable angle * * *"?

A. Well, to me it seems at first sight quite ambiguous, saying "* * * a constant although variable angle * * *"

After looking at the drawings and reading the rest of the specification the only meaning that I can get out of it, that isn't ambiguous, is that the seat 18 here (indicating) shall always lie at some angle to the horizontal, and vary, but never reach the horizontal. That is all I can make out of "* * * a constant although variable angle * * *"

Q. Is there any chance in the patent in suit of that seat or pad 18 ever reaching a horizontal position? A. No.

(Testimony of Robert T. Knapp.)

Q. As disclosed in the drawings and specifications in the patent in suit, does the support 20 for the seat 18 ever reach or pass beyond the vertical?

A. No, it specifically states in the specifications that it does not.

The Court: Never reaches the vertical?

The Witness: Never reaches the vertical. This was in that part of the text I read in that first section.

Q. (By Mr. Harris): Dr. Knapp, I show you Plaintiff's Exhibit 16, a drawing of one of the defendant's machines. [173]

Are you familiar with the drawing that is before you?

A. I have seen a copy of this same drawing.

Q. Have you made a study of it?

A. Yes, I have examined it.

Q. Now, with a pencil would you kindly put on the drawing — I suggest in Arabic numerals — an Arabic numeral to indicate, or identify each of the views on the drawing and describe very briefly what each view shows. Let's start up here in the upper right hand corner?

A. Let's call this 1?

Q. Let's use Roman numerals.

A. All right.

Q. What does that view generally show?

A. That is a side view, I would say, of the couch and applicator with the covering panels on, as it would appear when in use.

Q. And then would you mark this II, if you

(Testimony of Robert T. Knapp.)

please. A. (Witness complies.)

Q. What does that view generally illustrate?

A. This appears to be the top view of the couch and operating mechanism with the tops and pads removed; probably a section just below the top.

Q. Then will you mark the next III?

A. (Witness complies.) [174]

Q. I think there may be some confusion if you put it there. Perhaps if you put the Roman numerals out at one side it will not be confused with the view below. A. (Witness complies.)

Q. What does the view, the III, show generally?

A. This is a larger scale view of the machine as seen in Figure I, a side view, but with the covering panels removed so that some of the mechanism can be seen.

Q. Then will you kindly mark this view as IV.

A. (Witness complies.)

Q. And that is a section on the Line BB of Figure III, is it?

A. That is shown, the section line is shown in Figure III as the section from—looking towards the foot, I believe.

Q. Then will you kindly mark this view V?

A. (Witness complies.)

Q. And is that view a section of the Line CC, taken on Figure III?

A. Yes, this is also shown on Figure III.

Q. Looking towards which end?

(Testimony of Robert T. Knapp.)

A. The vertical section. Again looking towards the foot.

Q. You have marked the last few, I believe.

A. Started to mark VI. [175]

Q. VI, is that likewise a section but taken in the line DD? A. DD is right.

Q. Shown in Figure III?

A. That is right. Again a vertical cross-section, looking in the same direction as the other two.

Q. Now, will you kindly describe in a little more detail the operating mechanism shown on the right-hand side of Figure III of this drawing applying Arabic numerals to the parts as you point them out to the court.

A. If we start from the top down, I would say—

Q. Start with 10.

A. —10 is a pad which is fastened to the top of a rocker arm, which we can call 11.

This rocker arm is pivoted on a bearing 12, which is carried on a support 13, which is fastened to the tabletop; welded to the tabletop, I would imagine. This appears to be an angle iron fastened to the top (indicating).

Q. Excuse me. In this machine shown in the drawing is there one pad 10 or more than one pad?

A. If we go down to Section CC, Figure V, there are four pads, two on each side.

Q. Are the arms 11 in Figure III shown in this view, Figure V? A. They are. [176]

Q. Would you mark those as 11 on both sides?

(Testimony of Robert T. Knapp.)

A. May I mark one 11-A? They are somewhat different.

Q. Yes, indeed. So that, as I understand your testimony, in the defendant's machine shown in this drawing there are two pads mounted on the arm 11 and two pads mounted on the arm 11-A, is that correct? A. That is correct.

Q. Is there any connection, mechanical connection between the arms 11 and 11-A in this machine shown by this drawing?

A. Arms 11 and 11-A are pivoted on the same pivot which runs in bearing 12. Shall we give that another number?

Q. If you will. A. Pivot shaft here.

Q. Yes. A. I think we are up to 14.

Q. That is a shaft, is it?

A. That is a shaft that goes across the width of the machine between these two supports 13. Two supports 13 are shown in Section CC as well.

Q. And going back, is there any connection between the arms, any mechanical connection between the arms 11 and 11-A that are on that transverse rod?

A. No, they are both free to oscillate about this rod independently. [177]

Mr. Lyon: How do you show that?

The Witness: This line here is a division line from 11 and 11-A (indicating).

Q. (By Mr. Harris): Now, will you please mark that line that you have just pointed to with 15, the division that you referred to?

(Testimony of Robert T. Knapp.)

A. (Witness complies.)

Q. Then going back to Figure III on this drawing, will you continue your explanation of the general construction?

A. Yes. This arm 11 has an intermediate pivot point on it, which we can call 16.

Q. You say a "pivot point". What sort of a point is that?

A. Well, there is a small shaft that runs across—we can see it best on this Section CC. There is a small shaft. We will label this 16, which is shown here,—

Q. Yes.

A. —which is fixed to the arm 11 and goes through one end of a pitman or connecting rod at that point.

Q. Will you mark that connecting rod as 17?

A. (Witness complies.) Connecting rod 17. The other end of this goes over to a similar shaft, to 15, which is located on another set of supports. This shaft I will label 18. This is carried from another set of supports.

Q. Do those supports hang from the top of the table or are they— [178]

A. They hang from the top of the table in the same manner that supports 13 hang; call them supports 19. These carry bearings similar to those shown in 12, through which this rod, this shaft 18 can be rotated.

These are bearings 20 in this view. This is shown partially in Section DD.

(Testimony of Robert T. Knapp.)

Q. And how is the connecting rod or pitman 17 connected to the shaft 18?

A. The connecting rod 17 on the large end of it, it is enlarged to go around the outside of an eccentric which is carried on this shaft 18.

This eccentric—since this is an assembly drawing it is a little difficult to indicate exactly which part is which. I think this is the large end of the connecting rod 17. We will call it 17.

Q. I think we already have a 17. 17 is something up here (indicating).

I beg your pardon. It is the connecting rod.

A. It is the connecting rod, and this is the cam (indicating), which I believe we can call 21.

Q. Yes.

A. This cam, incidentally, is not the same as the cam on the other side of the machine working on 11-A. That is why I wish to have a separate number. [179]

Q. You refer to a cam on the other side of the machine. Where is that?

A. That would be this cam No. 22, which drives the pitman which oscillates the arm 11-A.

Q. So those arms 11 and 11-A are separately driven?

A. They are separately driven by separate pitmen.

Q. And what is the drive connection?

Mr. Lyon: What is the number of this cam?

The Witness: This cam I have called No.—

Mr. Harris: 21.

(Testimony of Robert T. Knapp.)

The Witness: —17.

Mr. Harris: Excuse me.

The Witness: 21.

Q. (By Mr. Harris): The connecting rod is 17 and the cam is 21 and the second cam is 22.

Mr. Lyon: And the shaft is 18?

Mr. Harris: The shaft is 18.

The Witness: The shaft is 18. Now, it is impossible for me to tell in this drawing which part corresponds to which in the functioning of this assembly 22.

Now, the eccentric or cam 21 is a simple eccentric fastened to the shaft 18. The eccentric 22 is made of two pieces. One, a sleeve with a dog clutch, which is fixed by set screws to the shaft. This I think is what I have labeled 22. [180]

Mr. Lyon: May I have that read?

(The record was read.)

The Witness: I will revise this, to call this 22-A (indicating). The eccentric itself is loosely carried on the eccentric carrier 22-A. The eccentric itself is 22-B. It also has the engaging member, the opposite engaging member of this little dog clutch.

Q. (By Mr. Harris): What is the purpose of that little clutch in there?

A. The clutch permits a free sliding of 180 degrees of the eccentric on the shaft, so if the shaft is revolved in one direction the eccentric slips until the dog clutch comes along and drives it then continuously at that phase angle with respect to the eccentric 21.

(Testimony of Robert T. Knapp.)

If the motor is reversed, then the dog clutch permits the eccentric to slide 180 degrees out of phase and changes the action of the eccentric and the pitman and the oscillating arm.

Q. How is that shaft 18 driven?

A. Shaft 18 is driven—we can see this in view III—is driven by a simple pulley on its outer end, and the end towards this end of the view (indicating) by a small electric motor fastened to the lower part of the base.

This motor is the reversible motor which I was saying made this possible to revolve this in either direction. [181]

Q. Dr. Knapp, have you ever seen any actual machine built as generally shown in this drawing before you?

A. I have seen the *Slenderella* table.

Q. Now, would you describe briefly to the court just what effect or how this operates? Do these pads which you have marked 10 on Figure III, do all these pads operate together in the operation of this machine, or what is the operation?

A. The operation of this machine is a program operation with a timer which controls the motion of the three possible events that can occur, plus rest periods.

The mechanism which we haven't described on the left hand side of the table is a simple linkage which makes it possible to oscillate the whole table a small amount.

(Testimony of Robert T. Knapp.)

Q. By "the whole table" do you mean the whole couch?

A. No, the couch top which is pivoted on two arms. Do you want me to mark these?

Q. Yes, I think you should.

A. I wish someone would keep track of these numbers. 23, I believe, is the next.

Q. Let's mark it 24 and be safe.

A. Let's call this one 24 and a similar one over here 25 (indicating). Arm 24, in addition, carries a little offset arm, which is driven by another pitman from a shaft and a separate motor. [182]

When this motor operates it causes the whole table top to oscillate back and forth longitudinally.

Q. Does that have any effect on the operation of the pad 10?

A. No, the pad 10, the mechanism for the pads 10, with the exception of the motor itself, are carried on the top of the table so that when this is operated it does not make this move (indicating).

Q. So, as I understand you, there is one type or one setting of operation for this particular machine, which you just described, and in which the tabletop moves as a whole back and forth?

A. That is right. The three possible motions then are with the tabletop oscillator motor operating, and that would be the same in no matter what direction that motor operated.

And then the two possible motions when the applicator or paddle oscillator motor is operated first in one direction and then the other.

(Testimony of Robert T. Knapp.)

Q. Will you explain that?

A. This is the program. The program seems to be that first, when the machine starts to operate, the motor operates in such a direction that the two arms 11 and 11-A operate together in unison, like this (indicating).

Q. Does that make the paddles on the arm move in unison? [183]

A. The paddles on top move in unison, so that there is a simple back and forth motion.

Mr. Lyon: At that time is what you call the dog clutch firmly engaged?

The Witness: Yes, the clutch is simply a limit which will permit a motion of 180 degrees, a half a revolution in one direction or the other. All during each operation it is engaged on one phase of the clutch.

Q. (By Mr. Harris): Would you explain the next position of operation?

A. Then the machine pauses for a short time and then goes to the reverse. See, this motor is reversed.

Q. There is a reversible motor used in this machine?

A. Yes. When the motor reverses arm 11 does exactly what it did before, but the eccentric which drives arm 11-A slips this 180 degrees and then it is firmly driven from then on.

And the motion of these two arms or the two pads are like this (indicating), they are just exactly opposite in phase.

(Testimony of Robert T. Knapp.)

Q. They move in opposition?

A. They move in opposition, yes.

Q. Next I place before you Plaintiff's Exhibit 17, which is the drawing of the defendant's Sacro-Matic table.

Would you briefly describe whether this shows [184] substantially the same mechanism as the other drawing, Exhibit 16, and any major differences in the two mechanisms.

A. Substantially the two machines operate in the same manner. The construction differs in a few minor points.

In this machine most of the construction is by welding. In the other machine it was partially welding and partially casting.

In this machine the drive motor for the applicator or paddle is carried on a bracket which comes from the tabletop instead of from the lower part of the couch.

Q. Will you mark that bracket with 30, if you please?

A. This bracket, which should also include this piece, is 30 (indicating).

Q. So that in this machine, illustrated by Plaintiff's Exhibit 17, the motor is mounted on a bracket suspended from the top of the table.

Whereas, in the other machine, illustrated by Plaintiff's Exhibit 16, the motor is simply mounted on a separate base. A. That is correct.

Q. Is there any other significant difference that you think of?

(Testimony of Robert T. Knapp.)

A. There are not other significant differences, except in the type of construction. The length of the, or the distance from the lower pivot point to the connection of the pitman is somewhat shorter [185] in this machine than the other, which makes the angle or the amount of oscillation slightly smaller in this machine (indicating).

Q. The arc of movement of the vertical arm in this machine, that supports the pad or applicator, is smaller or greater than in the other machine that is illustrated by Exhibit 16?

A. It is smaller than Exhibit 16.

Q. And does this machine, the Sacro-Matic machine illustrated in Exhibit 17, does that like the other machine have two supports that carry pads or paddles on their tops?

A. Yes, it has two supports. It has two supports that carry paddles on their tops.

These supports are oscillated independently as with the other ones, from two separate pitmen and two separate cams.

Q. Are those supports illustrated in the Sections CC and DD on Exhibit 17?

A. Yes, they are. This also shows the difference in construction, in that these supports are made up of two bars of iron welded to a sleeve at the top—at the bottom, and a pad at the top, in place of the single casting 11 shown before. So we have four, what appear to be four vertical supports in this machine; two for each pad. But they are taking the place of a larger casting.

(Testimony of Robert T. Knapp.)

Q. In other words, the support shown in the Section CC on Exhibit 17 is the same in function as the support 11—— A. Yes. [186]

Q. ——on Exhibit 16, is that correct?

A. Could I use the same numbers on this drawing?

Q. Yes, if you will please.

A. Then this is bracket 11 (indicating), and this is bracket 11-A (indicating). And they differ only in the same features that they differed in this one, in that this carries the dog clutch on the other shaft (indicating).

Mr. Lyon: Where is that dog clutch shown?

The Witness: That dog clutch is shown here in this view (indicating). This is the dog clutch (indicating).

Now, it is a very simple construction, easily overlooked. It is also shown here (indicating).

Q. (By Mr. Harris): By "here" you mean in Section DD?

A. In Section DD it is designated on the drawing as subassembly J, "S.A.J." This is a shop erection drawing.

Q. You said that the support 11 on Exhibit 17 was welded to a sleeve. You also said that the support 11-A on the same drawing was also welded to a sleeve.

Are those two sleeves one and the same or are they separate?

A. No, they are separate sleeves, just as they were in the other type of machine. And the junc-

(Testimony of Robert T. Knapp.)

tion is shown again on the end elevation, which I will label with the same number, 15. [187]

Q. And what is the operation of this machine, the Sacro-Matic machine, shown by Exhibit 17, as compared with the other machine shown in Exhibit 16?

A. As far as I could determine from watching them both operate, the operation, external operation is identical.

Q. They go through the same cycle?

A. They go through the same cycle. I didn't check the time, whether or not they are the same. They appeared to be the same, without taking a stop watch to it; the same sequence, same approximate time.

Mr. Harris: Next, if the court please, I produce a further drawing entitled "Slenderella Tables Operating Mechanism Range of Movement" which I ask be marked as Defendant's Exhibit C.

The Clerk: Defendant's Exhibit C for identification.

(The document referred to was marked Defendant's Exhibit C for identification.)

Q. (By Mr. Harris): Dr. Knapp, I show you Defendant's Exhibit C for identification. What is that drawing?

A. This is a drawing of the supports, the pad supports, the pitman and the eccentric of these two types of machines we have just been discussing.

Q. And under the left-hand view I notice the

(Testimony of Robert T. Knapp.)

legend "Drawing 9-26-56". Does that refer to the mechanism illustrated in—— [188]

A. I think this drawing, which was——

Q. Exhibit 16? A. ——Exhibit 16.

Q. And then under the right-hand view on Defendant's Exhibit C there is the legend "Drawing 6-5-56", and does that refer to the mechanism illustrated in more detail in Plaintiff's Exhibit 17?

A. Yes. This is the corresponding arm and support, and so forth.

Q. I note that the parts in this drawing, Exhibit C, are much larger than illustrated in the other drawings, Plaintiff's Exhibits 16 and 17. What is the explanation for that?

A. This appears to be a full size drawing of the two. This is the casting which we referred to on the first machine and this is the welded replacing structure on the other one (indicating).

Q. Well, now, using this drawing, Defendant's Exhibit C, will you kindly explain the range of movement of the upwardly directed supports in each of the views on this drawing?

A. Both of them are driven by the two pitmen which are caused to move back and forth by the eccentrics.

The support is pivoted around this shaft labeled "pivot" and is moved back and forth by this pitman under the influence of the eccentric (indicating). [189]

The three positions shown are the center position and the two limits.

(Testimony of Robert T. Knapp.)

Q. By the three positions you are referring to the full line position? A. Full line position.

Q. The full line position. And then there is a heavy dashed line position and a light dashed line position in each of the views?

A. That is correct.

Q. Are those the three positions you are referring to?

A. Yes, the full line position is the center position. The heavy dashed line is the position at the end of the motion towards the head of the table, and the light dashed line towards the foot.

Q. You have examined the Slenderella tables corresponding to the structures shown in Plaintiff's Exhibits 16 and 17, have you? A. I have.

Q. And how do these views, illustrated in Defendant's Exhibit C, correspond with the actual motion of the corresponding parts in the actual tables which you have examined?

A. If these are supposed to be full size drawings—and they appear to be—I would say that in both cases the actual arc of motion is greater than is used on the tables.

Q. In other words, in the tables you have [190] actually examined they have a smaller arc of movement than is shown by this Exhibit C, is that correct?

A. That is correct. I have measured both of them. I have the figures in my notes.

Q. Yes. Will you please tell us just what those

(Testimony of Robert T. Knapp.)

notes show with respect to that motion in the tables that you have examined?

A. I seem to have too many envelopes.

The Court: Well, it might be a good time to take our afternoon recess.

Mr. Harris: Very well, your Honor.

(Whereupon, a recess was taken from 2:46 p.m. to 3:09 p.m.) [191]

Q. (By Mr. Harris): Dr. Knapp, referring back to the defendant's tables illustrated by Plaintiff's Exhibits 16 and 17, do the applicators in those tables move axially of the length of the tables or couches?

Mr. Lyon: Excuse me. Before you go into that, Mr. Harris, I was a little interested in what the witness was testifying about just before we took the recess, about the arc in the tables being less than in the drawing.

Mr. Harris: We will take that up, if the court pleases, later.

The Court: I came back expecting to find that the doctor had located his notes and was going to tell us about it.

Mr. Harris: He has, your Honor. I am afraid I will forget this question if I don't ask him now.

The Court: You do it in your own way. I was just hoping we weren't going to be left in suspense much longer.

Mr. Harris: No, we are not.

The Witness: The pads, as I understand, actually do not move axially of the table.

(Testimony of Robert T. Knapp.)

Q. (By Mr. Harris): What does "axially" mean to you?

A. Axially to me means along the center line of the table.

Q. In the Stauffer patent in suit does the pad move along the center line of the table? [192]

A. From the description in the patent, it does.

Q. Coming back to this question as to the amplitude of movement of the upwardly upstanding support for the pads in defendant's tables exemplified by Plaintiff's Exhibits 16 and 17, which tables you have actually seen, will you please describe the amplitude of movement in each of those two tables?

A. On the table which we first discussed, Exhibit 16, I measured the horizontal amplitude of the applicator which is pad C—or, pad 10, and found that the total movement from one side to the other was $7/8$ ths of an inch.

Q. What was the total movement in the other defendant's table?

A. On the other table, drawing 17——

Q. Exhibit 17?

A. ——Exhibit 17, called the Sacro-Matic table, the motion was somewhat less. It was, as I measured it, about $49/64$ ths. It compares to $7/8$ ths as $56/64$ ths; 49 to 56.

Mr. Lyon: This measurement, did you make it from these drawings?

The Witness: I made it from the machines.

Q. (By Mr. Harris): Now, did you measure the amplitude of the arc of movement in degrees—

(Testimony of Robert T. Knapp.)

the amplitude of the arc of movement of the [193] upstanding supports for the pads in both of the defendant's tables?

A. I measured it in only the Sacro-Matic tables, but on that I measured the arcs on six tables.

Q. Will you please give the results of those measurements?

A. Yes. These six tables were all that were in the particular salon that I had access to.

Perhaps I had better, before I say what the angle was, tell you how I measured it.

Q. Yes, if you will, please.

A. I brought my so-called combination square. The protractor head which contains a movable protractor and the level bubble, because the discussion seems to be concerned with angles with respect to the horizontal and vertical, and the level bubble is an independent reference.

With this I was able to place this on the vertical arm and then adjust the level bubble until it showed a level, and then take off and read the arc. The accuracy, I would say, was about a quarter of a degree.

I found that—I think I had better read what I found and also describe what I mean. I measured the angle with the horizontal first, as the pad was in its furthest excursion towards the foot of the table, and then measured it at its furthest excursion towards the head of the table.

On the first unit which I measured these angles [194] were both one and a half degrees with the

(Testimony of Robert T. Knapp.)

vertical. One on one side of the vertical and the other on the other.

On the next table it was one degree towards the foot, two and a quarter degrees towards the head.

On the third table it was two and a quarter degrees towards the foot and one degree toward the head.

On the fourth table I measured what appeared to be slightly less than one and three-quarters degrees towards the foot and one and three-quarters degrees toward the head.

On the fifth table two degrees toward the foot and one and a quarter degrees toward the head.

On the last table, the sixth table, two and three-quarters degrees towards the foot and one-half degree towards the head.

I checked the over-all excursion by measuring this amplitude and the radius of the vertical arm and calculated the angle. It came out about three and a half degrees, which is within the limits of accuracy I would expect from my measurements.

Q. Have you made any measurement of the speed of reciprocation of the pads in either of the defendant's accused machines?

A. I counted the number of oscillations against a sweep second hand for a minute on the table shown in Exhibit 17, and that, as I counted, was 186 oscillations per minute. [195]

Mr. Lyon: How many was that?

The Witness: 186, plus or minus a couple.

(Testimony of Robert T. Knapp.)

Q. (By Mr. Harris): Did you observe the operation of any of the Sacro-Matic machines?

A. Yes. I did not watch them through a time cycle, but I operated them by turning them to one of—to each one of the three possible movements.

Q. And how did the rate of movement of the pads in the Sacro-Matic machine compare with the rate of movement of the pads in the machine shown in Exhibit 16?

A. As near as I could see, they were the same. I felt the same rhythm. I also noted that the pulley sizes and the motor speeds seemed to be the same in the two machines.

Q. Referring to the mechanism shown in the drawings of and described in the specification of the Stauffer patent in suit, and with particular reference to the motion relationship study that you made, what type of motion does the support 20 have in the patent in suit?

A. In the Stauffer patent?

Q. Yes. Is there any way to describe it generally?

The Court: Where is 20?

The Witness: The vertical arm.

The Court: I see it. I just couldn't find it.

Q. (By Mr. Harris): May I put it this way: [196] Does that mechanism in the Stauffer patent in suit operate in simple harmonic motion?

A. No, it does not. It operates one-half of the cycle taking place faster than the other half.

Q. And how about the defendant's accused ta-

(Testimony of Robert T. Knapp.)

bles shown by Exhibits 16 and 17 that you have seen, what type of motion do the pads have in those tables?

A. They approximate very closely simple harmonic motion.

The Court: Can you define simple harmonic motion for me?

The Witness: Simple harmonic motion is a motion which you obtain if you have a crank and connecting rod going to a piston, such as the motion of a piston in an internal combustion engine, automobile engine, and so forth, where the crank moves at a constant speed and the piston starts from one end of its stroke, slowly accelerating to maximum at the center and decelerating at the end, and repeating this very nearly on the return stroke.

It is defined by the relationship with the sine of the angle. You can express it mathematically, exactly, a pure simple harmonic motion.

Q. (By Mr. Harris): The word sine, s-i-n-e——

A. S-i-n-e.

Q. ——is a mere mathematical term, is it not?

A. It is a mathematical term which defines the [197] ratio of two sides of a triangle.

Mr. Harris: Does your Honor have any further questions?

The Court: No.

The Witness: I can draw what I mean on the board.

Q. (By Mr. Harris): I don't think it is required.

(Testimony of Robert T. Knapp.)

The Court: No. I think I follow it.

Mr. Harris: Next, if the court please, I produce a booklet containing, first, United States patent to Parker, No. 1,978,223, and United States patent to Miller, No. 1,953,424, and United States patent to Gunderman, No. 1,825,588.

I ask the booklet be marked as Defendant's Exhibit D, and that each of the three patents which I have identified in the booklet be marked separately as Defendant's Exhibits D-1, D-2 and D-3.

(The documents referred to were marked Defendant's Exhibits D, D-1, D-2 and D-3 for identification.)

Mr. Lyon: May we identify which one is which and——

Mr. Harris: Yes, I shall. Parker is D-1, Miller is D-2 and Gunderman is D-3.

I also have here an extra copy of this booklet for the court's use in case the court wishes to mark the copies up in any way.

The Court: Thank you.

Q. (By Mr. Harris): Dr. Knapp, do you have before you [198] a copy of the Gunderman patent?

A. Yes, I have such a copy.

Q. Have you studied it and are you familiar with its contents?

A. Yes, I have read the patent. I am familiar in general with its contents.

Mr. Harris: I next produce an enlargement of the Gunderman—I should say an enlargement of sheet 4 of the drawings of the Gunderman patent,

(Testimony of Robert T. Knapp.)

No. 1,825,588, which I ask be marked for identification as Defendant's Exhibit E.

(The document referred to was marked Defendant's Exhibit E for identification.)

The Court: Is that the same as Figure 6? It is an enlargement of 6?

Mr. Harris: Figure 6, yes, your Honor.

Q. Now, referring to the Gunderman patent, Mr. Knapp, will you kindly briefly describe what this shows and relates to?

A. The Gunderman patent is called a portable vibrating machine. This is the working mechanism of it (indicating).

Q. Excuse me just a minute, and I shall get these exhibits out of your way.

A. This machine really has two parts, a left-hand [199] mechanism and a right-hand mechanism.

The right-hand mechanism is a motor or some sort of a drive mechanism which operates two cranks or eccentrics.

Q. The motor is numbered what on the drawing?

A. Motor No. 10.

Q. Where are those cranks or eccentrics?

A. The crank going to the right is No. 21, and that to the left is numbered 50. 21 is carried on a pin which gives it a crankshaft action, which is the same as the eccentric and transmits this motion to the link 17, which is pivoted at the top at point 19 on a bracket 12, which is fastened to the base.

This arm 17 then is oscillated back and forth by

(Testimony of Robert T. Knapp.)

the revolution of the motor and carries a series of hooks 25, which are apparently used for some sort of belt or other mechanism to oscillate the patient's body.

The left-hand side we have an applicator 26 which is pivoted—it is carried on a vertical arm, pivoted on a bearing held at the base. The bearing bracket 41 and the shaft 40 is the pivot around which this oscillates.

Q. What is the vertical arm, how is that numbered?

A. The vertical arm seems to have two numbers, 27 and 31. I think 27 is a rib on the main arm 31.

This is driven by the eccentric 52 through the pitman or connecting rod 50 to the pivot 44 on this applicator 31. [200]

It causes the applicator to move on an arc around pivot point 40.

Q. What is the motion of the vertical arm or support 31 in that movement?

A. As far as it can be determined from the drawing it is approximately simple harmonic motion. In other words, it is a simple crank connecting rod. There is some complication, the fact this is at an angle. This only changes the motion in minor detail.

Q. Is the enlargement, Exhibit E for identification, a correct enlargement of the drawing, the accompanying drawing or the corresponding drawing of the Gunderman patent?

A. As far as I can see it is a direct enlargement

(Testimony of Robert T. Knapp.)

of the drawing, with the exception of these little lucite buttons which are fastened to it.

Mr. Harris: I produce a plastic model which I ask be marked for identification as Defendant's Exhibit F.

(The object referred to was marked Defendant's Exhibit F for identification.)

Q. (By Mr. Harris): Dr. Knapp, I hand you Defendant's Exhibit F for identification. What is that?

A. It appears to be a Keno-Matic model of the machine shown in this patent drawing.

Q. By "this patent drawing" you mean the enlargement—— [201]

A. That Figure No. 6 of the Gunderman patent.

Q. How do the parts of this model correspond with the parts illustrated in the enlargement, Defendant's E?

A. It appears to be the same size and same location. It looks as if we might fit the device to it.

Q. If we could lay this flat on your table here, then will you kindly fit the lucite model, Exhibit F, to the enlargement, Exhibit E, and demonstrate to the court.

What are those lucite buttons for that are on the enlargement?

A. They seem to be orienting buttons, to make this lucite model coincide in position quite closely to that in the drawing.

Q. Will you please operate the lucite model, and as you do so for the record describe what you are

(Testimony of Robert T. Knapp.)

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It causes the applicator to move on an arc around pivot point 40.

Q. What is the motion of the vertical arm or support 31 in that movement?

A. As far as it can be determined from the drawing it is approximately simple harmonic motion. In other words, it is a simple crank connecting rod. There is some complication, the fact this is at an angle. This only changes the motion in minor detail.

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(Testimony of Robert T. Knapp.)

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A. It appears to be the same size and same location. It looks as if we might fit the device to it.

Q. If we could lay this flat on your table here, then will you kindly fit the lucite model, Exhibit F, to the enlargement, Exhibit E, and demonstrate to the court.

What are those lucite buttons for that are on the enlargement?

A. They seem to be orienting buttons, to make this lucite model coincide in position quite closely to that in the drawing.

Q. Will you please operate the lucite model, and as you do so for the record describe what you are

(Testimony of Robert T. Knapp.)

doing so that both the court will know and the record will be clear as to just what you are doing in demonstrating the model.

A. Well, I am turning the disk on the shaft corresponding to the drive motor and causing the different parts of the machine to follow the motion they would in the case of the machine itself.

As I turn it, if we look at the left-hand mechanism it will be seen that it oscillates about this point 40 through an arc and back, and oscillates on the other side and [202] back.

Mr. Lyon: May I ask a question?

Mr. Harris: Why, certainly.

Mr. Lyon: As you operate that, Doctor, I notice that the top of applicator 26 as it moves appears to move about an arc which coincides with the top of the applicator 26.

In other words, as you move the model the top of the applicator 26 follows along the top line drawn on the drawing, is that correct?

The Witness: It appears to do so.

Mr. Lyon: There is no lifting effect there, is there? That wouldn't have any tendency to lift anything that was supporting it, would it?

Mr. Harris: Excuse me, if the court please. I think that is cross examination. I welcome any clarification that Mr. Lyon has, but I think that goes in the cross examination.

The Court: Do you object to his doing it now?

Mr. Harris: Yes, I do.

The Court: All right. Sustained.

(Testimony of Robert T. Knapp.)

Q. (By Mr. Harris): What type of motion is this that is exemplified by the model, Exhibit F, with respect to the Gunderman patent and the movement of the support 31 and its applicator 26? What type of motion is that?

A. The motion of this point is the close approximation [203] of simple harmonic motion. And this oscillation has the characteristics of simple harmonic motion.

Q. How does that compare with the motions of the pads in the defendant's machines illustrated by Plaintiff's Exhibits 16 and 17?

A. In general it is very similar. This angle is a greater angle with respect to the horizontal than in either of defendant's machines.

In one this angle is practically—this arm is practically horizontal and the other, it has a slight angle; quantitatively the thing is the same.

Q. By "this angle" you are referring to the angle the arm 50 makes with the horizontal?

A. Yes.

The Court: I thought you had shifted from non-infringement to a lack of invention.

Mr. Harris: We are, we are on that now.

The Court: You seem to be getting back again to the other.

Mr. Harris: We are on both. Things are interchangeable. I mean, they both go together hand in hand. Our point is if the defendant's structure is just like the prior art we can't possibly infringe.

(Testimony of Robert T. Knapp.)

Q. Is there any couch shown or described in the Gunderman patent, Doctor? [204]

A. There is no couch shown here. I will have to refresh my memory, but I believe there is no couch shown in the Gunderman patent.

The Court: I think Gunderman suggests the floor.

Q. (By Mr. Harris): Excuse me. Did you have an answer to that question?

A. No, I find no sign of a couch.

Q. In the Gunderman patent is there only one applicator 26 or are there more than one applicator?

A. On drawing Figure 5, sheet 3, it shows what appears to be a vertical plan, a plan looking down vertically from the top of the machine with two applicators 26.

Q. And as described in the Gunderman patent, do those applicators oscillate together?

A. I believe they are made so they can be, they oscillate—they could be easily set so they oscillate either together or at any phase angle desired.

Q. Are those applicators separately supported on separate supports, or are they supported from the same support?

A. No, they are completely separate. They are separately supported from separate supports, as shown in Figure 5, and seemingly driven by separate pitmen.

Q. How do those compare with the supports and

(Testimony of Robert T. Knapp.)

applicators in the defendant's machines, the Slenderella [205] machines?

A. To me they appear very similar. These are somewhat simpler construction, but very similar.

Q. Dr. Knapp, I note in Figure 6 of the Gunderman patent the connecting rod 50 is connected to the cam or eccentric 51 which is directly connected to the drive shaft of the motor.

Whereas, in the Stauffer patent in suit the drive shaft of the motor and the connecting rod 28, between them is a large pulley 50.

I shall put before you the enlargement of the Stauffer patent drawing. I am pointing out there is a direct drive from the motor through a cam or eccentric and a connecting rod to the vertical support 31 in the Gunderman patent. Whereas, in Stauffer there is an intermediate large pulley 48, which is built connected to the motor and then, in turn, drives a cam shaft or eccentric shaft which is 42 in the Stauffer patent.

What difference, if any, would that make in the operation of these devices?

A. Well, it would make no difference in the general type of motion. It would indicate that probably in the Gunderman machine it would operate at a higher speed because if this is a simple motor it would normally go at higher speed because of the speed reduction shown in the Stauffer [206] patent.

Q. The speed reduction by virtue of those pulleys shown in the Stauffer patent?

A. The pulleys and the belt.

(Testimony of Robert T. Knapp.)

Q. And is it conventional practice or is it not conventional practice in electric motors to include a gear reduction unit directly in the motor itself?

A. This has been a type of motor which has been available for, I would say, approximately 30 years, and which you can buy off the shelf, a motor with an integral gear reduction on one or both ends with specified speeds.

Q. Is there any disclosure in the Gunderman patent as to whether it has such a gear reduction unit or not?

A. I remember no discussion of speed in the Gunderman patent.

Q. Referring next to the Miller patent, No. 1,953,424, which is marked as Defendant's Exhibit D-2, do you have a copy of that Miller patent before you, Dr. Knapp? A. Yes, I do.

Q. Have you studied it and are you familiar with its contents?

A. Again, I have read it and I am in general familiar with the contents.

Mr. Harris: Excuse me. Before we proceed with that, I offer into evidence the enlargement of sheet 4 of the [207] drawings of Gunderman as Defendant's Exhibit E.

The Court: Received.

(The document heretofore marked Defendant's Exhibit E was received in evidence.)

Mr. Harris: And next at this time, I offer into evidence the lucite model of the Gunderman mecha-

(Testimony of Robert T. Knapp.)

nism, Exhibit F for identification, as Defendant's Exhibit of the same letter.

The Court: Received.

(The object heretofore marked Defendant's Exhibit F was received in evidence.)

Q. (By Mr. Harris): Will you please describe briefly and generally what this Miller patent shows and relates to, first, with reference to Figures 1 and 2 of the drawings in the patent?

A. This shows a machine of the type that we have been discussing here, in which a patient is placed on some sort of a table or in some sort of a chair, if it is like the last one, a portable machine.

This seems to be a semi-portable machine of a relatively low couch, with a head rest and a foot rest that can be placed on the floor, with some sort of an applicator coming up along the axis of the machine. This applicator is No. 27. And some straps going over the body with some sort of devices on the side. [208]

Mr. Harris: Next, if the court please, I produce what purports to be an enlargement of sheet 3 of the Miller patent, No. 1,953,424, which I ask be marked for identification as Defendant's Exhibit G.

(The document referred to was marked Defendant's Exhibit G for identification.)

Q. (By Mr. Harris): Now, with respect to Exhibit G, Dr. Knapp—

Mr. Lyon: Pardon me, Mr. Harris.

Mr. Harris: Yes.

Mr. Lyon: Did you say sheet 3 or is it Figure 3?

(Testimony of Robert T. Knapp.)

Mr. Harris: It is sheet 3. It is Figures 4, 5 and 6. Sheet 3 showing Figures 4, 5 and 6 of the Miller patent.

Q. With respect to this enlargement, Dr. Knapp, is this also a correct enlargement of the corresponding sheet of the Miller patent?

A. I have examined it, and as far as I can see, with the exception of these little buttons again, it is a correct enlargement.

Q. Now, with respect to Figure 4 of the Miller patent, would you kindly describe briefly to the court the mechanical construction of this device, first?

A. The device shown here seems to be a section of the table which we were just examining a minute ago, in which 20 is the top surface and the pad indicated by 22, [209] bolted or fastened to the upper—the supporting surface of this pad is the mechanism, consisting of a motor 49, some sort of a clutch 51, and the reduction gear—it appears to be a worm reduction gear—labeled 50, which carries on the slow speed shaft a crank arm 68, and something similar on the other side in an assembly labeled 53.

The crank arm has a ball and socket joint on it, which is engaged in a connecting rod or pitman 71, driving, oscillating by connection at point 70 a bell crank, which I take it is No. 38, which is pivoted on a shaft, a fixed shaft at 43, and carries on its out-board end a pin 37.

Q. How is that pivot 43 mounted?

(Testimony of Robert T. Knapp.)

A. That is mounted to a bracket which is carried by the frame of the machine.

Q. Suspended from the top of the table?

A. Suspended from the top of the table. Everything is suspended from the top of the table of this machine.

Q. Will you proceed with the explanation of the mechanism? You got to the pin 37.

A. Yes. Now, there is an independent link or lever 35, which is independently pivoted around a shaft, a fixed shaft 41, which is carried by the fixed bracket 40.

On the top edge of this link is a device for holding a movable applicator, which I think is No. 37. This is [210] adjustable about point 32.

Q. Excuse me. Did you refer to the applicator—as what? A. 27.

Q. 27. Yes.

A. This is adjustable—how it sets with regard to the horizontal about point 32, and the whole device can be slid along what appears to be rails 34.

Q. Are those shown in Figure 5 here, that mounting of the applicator—

A. Yes, that mounting is shown clearly in Figure 5 in which 33 is these rails at 34—I see no particular difference between 33 and 34, except the two opposite sides of a T rail is clamped by the bracket 31 coming down from the applicator 27.

Q. Is that whole applicator mechanism adapted to be slid back and forth on the arm or link 35?

A. It can be slid back and forth on the arm or

(Testimony of Robert T. Knapp.)

link 35 and independently adjusted as to tilt around point 32. Then this is an independent link (indicating).

This bell crank is the device which is oscillated by this gear reduction and the bell crank—and the crank on the motor shaft (indicating).

They are held together or caused to move—this link 35 is caused to move by an adjustable link 45, or, 44, [211] which is so fashioned it is a fork and slips over the pin 37 on the outboard end of this bell crank (indicating).

The other end is a yolk carrying—like two fingers of your hand, carrying a pin across it in the horizontal direction, I take it, is 45. That can be dropped into the circular slots 36 that were cut in the bottom edge of this arm or link 35.

Q. What is the purpose of those notches 36 in the arm 35 and the notches 46 in the member 44?

A. Apparently, these notches 46 are to adjust the vertical position, or the angular position of this member 35 with respect to the link 38 and with respect to the machine itself.

In other words, by changing this you change the center of the motion about which this arm will move if this link is oscillated.

If notches 36 appear to be for the purpose of varying the amplitude of this motion, because this has, this pin point 37 has a constant amplitude. Therefore, by moving this towards the pivot point here (indicating), the amplitude of this will be increased.

(Testimony of Robert T. Knapp.)

By moving it away the amplitude will be decreased with a constant motion at this point (indicating). So we have a double adjustment on this.

It also will give a slightly different character to [212] motion. This is a little too complicated and too many sharp angles to say it is approaching simple harmonics. I do not know how far it deviates from it.

Mr. Harris: Next, if the court please, I produce a further lucite model which I ask be marked as Defendant's Exhibit H for identification.

(The object referred to was marked Defendant's Exhibit H for identification.)

Mr. Harris: I display this to counsel.

Q. Mr. Knapp, you have examined this model, have you? A. Yes, I have.

Q. And what does it represent?

A. It appears to represent the principal operating parts of the drawing as shown here (indicating).

Q. By "the drawing shown here" you mean Exhibit G? A. Exhibit G, yes.

Q. Will you please superimpose the lucite model on the drawing, Exhibit G, enlargement, and demonstrate to the court, explaining as you do so, the operation of this model and the Miller machine.

First, I suggest, Dr. Knapp, that you arrange the model so that its parts correspond with the position shown on the enlargement, Exhibit G, so that the parts overlay the similar parts on the enlargement.

A. This appears to be that position (indicating).

(Testimony of Robert T. Knapp.)

Q. Yes. Will you explain what you do and demonstrate the model to illustrate to the court how this Miller patent mechanism operates?

A. This shaft with a little turning disk on the end (indicating) represents the closed speed shaft coming out of the gear reduction.

Q. By that you are referring to the shaft—I don't know it is marked on this view. But at any rate,—

A. Shaft 52—no. No, this is the other mechanism on this end (indicating).

Q. At any rate, it is this knob which is mounted on the member?

A. Yes, this piece, we can look through the lucite and see the ball and socket joint. It corresponds to 69. This is the arm 68. This is an adjusting thumb screw 72.

Q. Now, will you move that member 68 and illustrate the movement?

A. This, of course, you see this revolves normally by the motor (indicating) and causes the machine to move as shown.

Q. As you move that from the position illustrated in the drawing, Exhibit G, what happens to the position of the pad or applicator 27?

A. Well, it moves on an arc about the pivot point 41, driven by this link 44 (indicating). [214]

I think this clearly shows the independence of these two links with this adjustable connecting lever. It moves on an arc, as you see, about this point (indicating).

(Testimony of Robert T. Knapp.)

This motion is a simple oscillation around this point with its time variation affected by these rather severe changes in angle involved in this link (indicating).

Q. And with the parts of the model in the position in the enlargement, Exhibit G, is the movement of the applicator or pad 27 on only one side of the vertical or does it move on two sides of the vertical line?

A. It is on one side of the vertical because this pivot point—wait a minute, now.

Yes, it is basically pivoted around this point—(indicating)——

Q. About the point——

A. About the point 39.

Q. 41, isn't it?

A. 41, yes. And thus any point that stays above this, vertically above a horizontal line going through this point will move only on an arc at one side of the vertical (indicating), no matter what complications we have in this mechanism.

Q. Now, by adjusting the model, Exhibit H, so as to put the pin 37 in the lowest notch 46 on the arm or link 44, and putting the pin at the upper end of that link 44 [215] in the right hand notch, the most right-hand notch 36 of the member 35, as so adjusted will you demonstrate to the court the operation of the device?

A. The motion is a shorter arc, as you will see, because moving this link 44 out to the extreme posi-

(Testimony of Robert T. Knapp.)

tion gives it the smallest arc possible with this mechanism.

But moving it up as far as it can on the vertical, to the last notch 46, it swings the arc of the pad to a more—more towards the vertical again.

Q. And in that movement what is the limit position of the pad relative to the limit position shown in the drawings, Exhibit G?

A. It projects considerably higher above the table at the upper limit.

Q. And farther toward one end of the table, is that right?

A. And farther toward, as I remember it, the foot of the table, yes.

Mr. Harris: If the court please, the enlargement, Exhibit G, is offered into evidence as Defendant's Exhibit of the same letter.

The Court: Received.

(The document heretofore marked Defendant's Exhibit G was received in evidence.) [216]

Mr. Harris: And the lucite model of the Miller patent, Exhibit H, is offered into evidence as Defendant's exhibit of the same letter.

The Court: Received.

(The model heretofore marked Defendant's Exhibit H was received in evidence.)

Q. (By Mr. Harris): Are you familiar with the contents of the Parker patent, No. 1,978,223?

A. I have a copy of this patent and I have read it. Again, I am familiar in general with what is contained in it.

(Testimony of Robert T. Knapp.)

Q. Will you please describe briefly and generally the construction shown and described in the Parker patent?

A. This patent again shows the operating mechanism built into a treatment table. The table is shown here as No. 13 with the head on the left-hand side, the headrest 14.

Q. First of all, Dr. Knapp, what are these two views, Figure 1 and Figure 2, of the Parker patent?

A. Figure 1 is a plan view looking down from the top with a portion of the top surface broken away to show some of the mechanism beneath.

Figure 2 is a vertical elevation in cross section so as to show the working mechanism.

Q. Yes. Now will you proceed with your explanation of the mechanism shown in those views?

A. The mechanism consists of a motor No. 33 and speed-changing [217] unit No. 32, with a belt drive from pulley 31 to pulley 28 in the vertical plane.

The motor and speed reducer is mounted on a base, the floor of the machine, and this device is mounted on the table top (indicating).

Q. By "this device" you mean the pulley arrangement 28 and 29?

A. The pulley arrangement carrying with it a slot which is, in effect, an adjustable throw cam, adjustable throw eccentric or crankshaft.

On this a pivot point 28b, which acts as an eccentric or crankshaft, to drive the member 27, which

(Testimony of Robert T. Knapp.)

is again a pitman or connecting rod, whose end is pivoted at 26 on a mechanism which is constrained to move only in the horizontal direction.

So that by operating the motor this rod 24 is caused to oscillate back and forth on again a very close approximation of simple harmonic motion.

Q. And what is connected to the left of the arm 24?

A. The arm 24 carries a long bar which is guided—

Q. Is that the bar 23?

A. The bar 23. —which is guided by the rod 24 at the right-hand side and by a corresponding rod at the lefthand side; presumably 24 continued through guide bushings 25, the same number on both sides. This whole device then [218] oscillates back and forth in simple harmonic motion (indicating).

On this device there are pins which project horizontally, or rods which project horizontally that can engage each one in a mechanism whose number in general, I believe, is 18.

This is again an oscillating member of vertical support, which is pivoted at the lower end about a shaft 36, which remains fixed in the operation of the machine.

So these are all No. 36. The vertical position of 36 can be adjusted by a series of jacks, one under each of these operating supports, so that they can be varied, as is seen in the patent drawing, from a

(Testimony of Robert T. Knapp.)

low position, something like that (indicating), to a high position, like this (indicating).

Q. Is the construction of each of those supports illustrated in Figures 3 and 4 of the drawings of the Parker patent?

A. This is a drawing in detail of the construction of each arm support or applicator.

Q. First, as to the support shown in Figure 3, that is a view, is it not, similar, taken from the same position that the views are taken——

A. Yes.

Q. ——in Figure 2 of the Parker patent?

A. This is enlarged view of any one of these applicators. [219]

Q. Then what is shown in Figure 4?

A. It is the view at 90 degrees, looking from, presumably from the head end of the machine—no, the foot end of the machine, the motor end of the machine.

Q. Of one of these applicators?

A. Of one of these applicators.

Q. Will you retrace a little bit the construction of that in more detail?

A. The jack which adjusts vertically the pivot shaft 36 is shown here with the jack screw 38 and the base 43.

This is the pivot point of the support member which consists of two arms (indicating). The rod 23, which we previously described—was previously numbered in 23—is the rod that oscillates back and forth by the pitman and the motor (indicating).

(Testimony of Robert T. Knapp.)

This rod goes through the two arms 45, through a slot which permits this vertical adjustment, the slot 18b, so that although the jack is operated, the motion of this will be always forced by the motion of the rod 23 (indicating).

Q. And what are these things 17 on the upper end of the upstanding arms or supports you have described (indicating)?

A. These are seemingly the applicators which contact the body of the patient. They contain, I believe, heating elements and provide heat as well as motion. [220]

Q. What is this screw that is numbered 34 in Figure 4 of the Parker drawing?

A. No. 34 is a screw which makes it possible to adjust the lateral separation of these two arms of this applicator; presumably to fit the body, I suppose (indicating).

Q. Going back for just a minute, in the Slenderella accused machines shown in Exhibits 16 and 17, is there any provision made for moving the pads towards or away from each other?

A. Yes. Each arm carries twin pads. The outer, speaking laterally from the axis of the machine, the outer pad is adjustable and can be—its separation from its mating pad can be adjusted over quite a wide range.

Q. And when this Parker machine is operated, what is the nature again of the motion of the vertical applicators 18 or 17, whichever we consider them?

(Testimony of Robert T. Knapp.)

A. The motion is again simple harmonic motion. From the way the drawing is built it is evident that they contemplated an oscillation symmetrical about the vertical. The crank is shown at 90 degrees when this is in vertical motion (indicating). So it means it would oscillate on both sides of the vertical, the amount controlled by the position of the pin 28b.

Q. Do I understand you to mean by adjusting the position of this pin 28b in its slot 28a, you can control [221] the length of throw or the arc of movement in each of these applicators 17?

A. That is correct.

Mr. Harris: If the court please, this enlargement of sheet 1 of the Parker patent No. 1,978,223, which the witness has been referring to, I offer into evidence as Defendant's Exhibit I next in order.

The Court: Received.

(The sheet referred to was marked Defendant's Exhibit I and was received in evidence.)

Q. (By Mr. Harris): Dr. Knapp, does this enlargement correctly illustrate, or is it a true enlargement of the corresponding sheet of the Parker patent?

A. So far as I can ascertain it is a true enlargement.

Mr. Harris: Next, if the court please, I produce a further lucite model, which I ask the clerk to mark as Defendant's Exhibit J for identification.

(The model referred to was marked Defendant's Exhibit J for identification.)

(Testimony of Robert T. Knapp.)

Q. (By Mr. Harris): Dr. Knapp, I show you this lucite model, Defendant's Exhibit J for identification.

Do you recognize that model?

A. It appears again to be a Keno-Matic model of the working parts of this Parker machine.

Q. The parts of the model correspond, do they, to the [222] parts shown in the enlargement, Exhibit I?

In other words, the parts of the model correspond, do they, to the parts on the enlargement?

A. We can demonstrate that by setting the model on top of the enlargement; setting this in this position, as shown (indicating).

Q. Do you have the parts of the model in position shown in the drawing?

A. They appear to be.

Q. Now, will you illustrate to the court just how this Parker machine operates?

A. This shaft that carries this disk is driven by the belt from the pulley on the speed changer 32 (indicating), so that when I turn this it is doing what the motor would do to the machine. And as this turns it will be seen that——

Q. First of all, what happens to the connecting rod 27?

A. Connecting rod 27 oscillates, this end oscillates (indicating). That is driven by the motion of the right-hand end around the crank circle. This describes again a very close approximation of simple harmonic motion, which is communicated to each of

(Testimony of Robert T. Knapp.)

these applicators by the pins, I take it, 40 (indicating), which project from the bar.

Mr. Lyon: 34, Doctor.

The Witness: 34. To the individual applicators. This [223] end, which may be confusing, this cross piece shown, is simply the handle at the outboard end of that pin (indicating).

Q. Those are for what purpose?

A. Those are for adjusting the separation shown here of the two applicators carried on the single arm.

The vertical motion of this is again, as I indicated from inspection of the drawing, a motion which is apparently symmetrical about the vertical.

And the top of these applicators (indicating) then moves in a small arc essentially oscillating about the horizontal.

Q. How does that motion of each of these applicators compare with the motion of applicators or pads in the defendant's accused machines?

A. I would say they were, for all intents and purposes, identical.

Mr. Harris: This lucite model is offered into evidence as Defendant's Exhibit J next in order.

The Court: Received.

(The model heretofore marked Defendant's Exhibit J was received in evidence.)

Q. (By Mr. Harris): Referring, first, to this Parker patent, Dr. Knapp, could the motion of the vertical applicators 17 be changed to approximate

(Testimony of Robert T. Knapp.)

that or to be the same as that of the Stauffer patent in suit? [224]

A. The position of, shall we say, the midpoint of the arc of the applicator is determined by the relative relationships of the parts. That is, we have to have the right length and the right position at this end and the right length here (indicating), in order to get this to oscillate about the vertical.

If, for example, this base 29, carrying the pulley and crank, were to be moved to the left the whole arc would be shifted more—with most of the arc on the left-hand side and less on the right-hand side of the vertical (indicating), and if the shift is continued, it could be easily carried, providing it didn't hit a portion of the machine, so that all of it was on one side of the vertical.

By shifting the base 29 in the opposite direction it could be made to be on the foot side of the vertical rather than the head.

Likewise, by changing the length of the member 24, leaving position 29 the same, it could be shifted in the same manner and, likewise, by shifting, changing the length of the connecting rod 27, it could be shifted.

Changing the position of the crank throw—changing the amplitude of the crank throw would do nothing toward changing the range of the arc. All of these other adjustments would modify it.

Q. In the Parker patent is there a slotway formed in [225] the top surface of the couch or table?

(Testimony of Robert T. Knapp.)

A. Yes, there is a slotway shown in Figure 1, presumably designated by 13a.

Q. And in Parker is there a vertically directed and oscillatable support for an applicator?

A. Yes, each of these members 18 would be so described.

Q. And there are six of those, are there not?

A. There are six of those shown here.

Q. In Parker there is, is there not, means to oscillate said applicators axially the length of the couch—strike that question. Excuse me.

In the Parker patent do the applicators move lengthwise of the table or couch?

A. The motion—the amplitude of the motion is lengthwise of the couch.

Mr. Harris: I don't know what your Honor's pleasure is. I will be a little while longer with this witness and I am sure Mr. Lyon will have some cross examination. I don't want to keep your Honor if you are——

The Court: Do I take that as a suggestion we adjourn?

Mr. Harris: Yes, your Honor.

The Court: All right. I will follow your suggestion. 1:30 tomorrow.

(Whereupon, at 4:20 o'clock p.m., Thursday, November 15, 1956, an adjournment was taken to Friday, November 16, 1956, at 1:30 o'clock p.m.) [226]

Friday, November 16, 1956—1:38 P.M.

The Court: All present. You may proceed.

Mr. Harris: The court please, at this time we offer in evidence Defendant's Exhibit C for identification as Defendant's Exhibit of the same letter.

The Court: Received.

(The document heretofore marked Defendant's Exhibit C was received in evidence.)

Mr. Harris: At this time we offer into evidence Exhibits D, D-1, D-2 and D-3 as Defendant's Exhibits of the same letters.

The Court: That is the prior art?

Mr. Harris: The prior art, yes, your Honor.

The Court: Received.

(The documents heretofore marked Defendant's Exhibits D, D-1, D-2 and D-3 were received in evidence.)

[See Book of Exhibits.]

ROBERT T. KNAPP

called as a witness on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Harris): Dr. Knapp, you explained yesterday certain differences in the movements of the applicator supports in the six [230] Sacro-Matic tables of the defendant, which you personally examined.

What, in your opinion, is the explanation for that variation that you described in the movement of those six table supports?

(Testimony of Robert T. Knapp.)

A. I would say that the primary reason for this difference is in the errors in construction in the machine. The frame of the machine and the frame of the mechanism are both made of welding pieces of standard structural shapes. These must be held in a jig or something of this kind while they are being welded, and the welding process causes warping and distortion, so that a certain reasonable tolerance has to be accepted in this.

Now, the construction of this, of the supports, in which the oscillation is relatively small, that is, of the order of three-quarters of an inch, and where the pitman is connected quite low down on a support, it only requires relatively a third or 40 per cent of the total motion of the top of the pad at the connecting point of the pitman. So that a small displacement there in the manufacture can cause the device to be, the arc of actuation to be moved on one side or the other a bit. It could be easily corrected if there was a point to it, but this seems to be all the required accuracy.

Q. What was the total amplitude of movement of the [231] applicator supports in the two types of defendant's machines which you have examined, in degrees?

A. In degrees the two movements, as I remember them, were approximately $3\frac{1}{2}$ degrees in the Sacro-Matic and 3.9 degrees in the first machine.

Q. By "the first machine" you mean the Findlay, Ohio machine?

A. Findlay, I believe it is called.

(Testimony of Robert T. Knapp.)

Mr. Harris: Next, if the court please, I produce a card which I ask be marked for identification as Defendant's Exhibit K.

(The card referred to was marked Defendant's Exhibit K for identification.)

Q. (By Mr. Harris): Dr. Knapp, I hand you Exhibit K. Will you describe what that is and what it illustrates?

A. This is simply, shall we say, another Keno-Matic model of the vertical support which carries the applicator pad of this type of machine.

The rivet, the copper rivet at the bottom represents the pivot point. There is no connection to the pitman shown, just simply the vertical arm.

And the cross-hatched areas represent the arcs of movement.

Q. Of what?

A. Well, there are two sets. The ones that are [232] symmetrical around the vertical, two degrees on each side, represent what we can call the envelope of the movement of the two Slenderella machines.

In other words, it is slightly larger than the largest motion of either of the two machines, two degrees on each side of the vertical, moving as I am showing it moving now, oscillating it back and forth (indicating).

The larger cross-hatched sector represents the 10-degree arc described in the specifications of the Stauffer claims—not the claims, but the patent.

Q. The Stauffer patent in suit?

A. The Stauffer patent in suit. It is interesting

(Testimony of Robert T. Knapp.)

to note that the 5-degree minimum tilt from the vertical, called for in the Stauffer claim, makes the two sectors not overlap. In fact, there is a space between the two sectors of action that is as nearly as large as the motion of the Slenderella machine.

Mr. Harris: Thank you. This Keno-Matic model, as the Doctor described it, is offered in evidence as Defendant's Exhibit K.

The Court: Received.

(The card heretofore marked Defendant's Exhibit K was received in evidence.)

Q. (By Mr. Harris): Referring to the comparative drawing, which is Defendant's Exhibit C, does the view on [233] the right illustrate the pad on the top of one of the tables, defendant's tables, which you have examined?

A. It illustrates the end view of the two pads that are on each applicator.

Q. The end view or the side view?

A. Well, the side view looking at the machine normal to the longitudinal axis.

Q. Yes. What sort of a pad was on the other machine you examined, the machine illustrated by the right-hand view in this drawing, Exhibit C?

A. As far as I could determine they were identical.

Q. Thank you. I place before you Plaintiff's Exhibits 18 and 19.

The Court: There are now in evidence, are they?

Mr. Harris: Yes, your Honor.

Q. (By Mr. Harris): Do those, in your opinion,

(Testimony of Robert T. Knapp.)

accurately represent the nature of the movement of the applicator supports in either or both of the defendant's machines which you have examined?

A. I would say, to answer that specifically, they do represent accurately the movements. They represent the general type of movement.

Q. I show you the drawings, Plaintiff's Exhibits 16 and 17, Dr. Knapp. Are those production drawings, or what are they? [234]

A. No, I would say they are—this Exhibit 17, I would say, was an illustrative drawing for assembly purposes. It refers—it is a direction to an assembler how to put the pieces together. They are referred to as subassemblies, as you would expect on an assembly line, where we have many articles labeled "Subassembly G, Subassembly J," Subassembly so and so. It illustrates where to put them on the assembled table.

Q. Are drawings of this nature normally used by a manufacturer for the purpose of actual manufacture of the part?

A. No, no, they would be used only for assembly after the parts are manufactured.

Q. Is the same true of Plaintiff's Exhibit 16?

A. I would say this is more of an illustrative drawing, not meant particularly for assembly or for construction.

Mr. Lyon: Mr. Harris, are you attempting to impeach the drawings which you furnished at my request?

(Testimony of Robert T. Knapp.)

Mr. Harris: No, indeed. You asked me for drawings of the machines and I produced them.

Mr. Lyon: Are you now trying to say they don't represent the machines?

Mr. Harris: No. I just want to know what kind of drawings these are and that is what the witness has testified to.

The Court: Now, I would like to ask a question.

Mr. Harris: Certainly, your Honor.

The Court: To what extent may I safely look to Exhibits 18 and 19 in this case, and what will they show me if they are used to the fullest extent, as illustrations of portions of these structures?

The Witness: Well, I would say something of this nature (indicating). This is headed identification No. 18.

If we restrict ourselves only to this action and not to the oscillation of the table——

The Court: Yes.

The Witness: ——because we haven't discussed that, that this drawing seems to illustrate the general motion, with the exception that the amplitude is considerably greater than the amplitude of the machine. This looks to be not more than a full-scale drawing, but the angle——

Mr. Lyon: You mean model, don't you, Doctor?

The Witness: Full-scale model. I would just guess this is of the order of 12 inches (indicating).

The Court: Yes.

The Witness: But this amplitude is 50 per cent to 75 per cent greater than the amplitude I meas-

(Testimony of Robert T. Knapp.)

ured. So it swings on a bigger arc, but it does about the same thing.

The Court: Which swings on a greater arc?

The Witness: This vertical——

The Court: This 18—— [236]

The Witness: Exhibit 18, this vertical red support swings on a greater arc (indicating).

The Court: Thank you.

Q. (By Mr. Harris): A greater arc than what, if you please?

A. Than the actual Slenderella machine. On this one marked 19, which I believe is made to illustrate the Sacro-Matic table, the difference that I note in addition to it still swinging on a greater arc is that as I observe it it seems to only go slightly past the vertical on one side and considerably past the vertical on the other, which——

Mr. Lyon: At this point, Doctor, didn't you testify yesterday that several of the machines you measured at Slenderella, one of them was $2\frac{3}{4}$ degrees one way and only $\frac{1}{4}$ degree the other way?

Mr. Harris: The court please, Mr. Lyon is cross-examining now—or if it is helpful to you——

The Court: I think it is not quite the place to do it, Mr. Lyon. The court wasn't quite certain about these Exhibits 18 and 19, and I asked the witness to clarify my uncertainty, which he was doing, and you cut right in the midst of one of his sentences.

Can you find where he was at the time? We will let him finish that answer.

(Testimony of Robert T. Knapp.)

(The record was read.) [237]

The Witness: —would not correspond to the information on those drawings. The information on the two drawings, from which these were presumably made, showed the member in the vertical position.

It is common practice on a symmetrical moving device you would show the member in mid-position. I think that discrepancies like this could be explained from trying to get accurate dimensions from these illustrative drawings, where the draftsman would have no reason to exert care enough for manufacture.

The Court: Drawings of this kind often occur, do they not, when the invention is still a brainchild of the inventor and has not been reduced to practice, so they are all in the early stage of the creation?

The Witness: Yes, you can express things in rough sketches, but when you do, you wish to convey to yourself a future idea, you usually use the conventions.

The Court: Yes.

The Witness: So, although they are not accurate to dimensions, they will illustrate to a person used to drawings and to yourself later on, if you are trying to remember something, a concept.

The Court: Yes. These cases are seldom decided immediately in the courtroom. The lawyers usually get this transcript and they ask me to read

(Testimony of Robert T. Knapp.)

it back, in the light of [238] arguments which they will submit in writing.

I wanted to have a little clarification, which you have now given me, regarding these exhibits, so I will be better prepared to cope with the arguments when they are presented.

Q.(By Mr. Harris): Dr. Knapp, do you have a copy of the Stauffer patent in suit before you?

A. Yes. I believe I have all the papers here.

Q. Do you have it? A. Yes.

Q. Have you read Claim 1 of the patent in suit?

A. Yes.

Q. And studied it with relation to the specifications and the drawings of the patent in suit?

A. Yes, I have.

Q. I call your attention to the words that appear in the sixth line of Claim 1 of the patent in suit, the words "tiltingly move."

What to you, as a man skilled in the art, do those words mean?

A. When I first read them I didn't know what they meant, because, like most English words, they could mean a variety of things. I tried to figure out what they meant from, first, the content of the claim, the rest of it, and then the contents of the specifications.

Assuming, since I am not a patent expert, but feeling [239] that patent procedure is pretty complicated, that words were probably used in rather narrow senses because of the necessity of distinguishing between things that are nearly alike,

(Testimony of Robert T. Knapp.)

so I went through some sort of a process like this:

Reading this applicator adapted "tiltingly move" in the previous part of the same sentence here it is supported on an oscillatable support. And then in the same sentence it says "* * * means to oscillate said applicator * * *"

So I assume that "tiltingly" could not mean simply oscillate, because it had been said twice before and that would make it very redundant.

Therefore, I went back to the specifications which describe the movement of the support, and thereby of the applicator, and found on page 2 at the end of the first paragraph, where it says:

"This arrangement causes the seat 18 to lie at a constant although variable angle with respect to the upper surface of the couch."

Preceding that it is said that the support moves between a probable maximum of 15 degrees from the vertical and an extreme forward motion of 5 degrees from the vertical on the other extreme.

And, furthermore, on the second column of this same page it specifies very clearly that the seat shall at no time pass the vertical. So I assume that this meant what it does [240] mean in geology. I looked it up in Webster's Unabridged and find that "tilt" or "tiltingly" means inclined to the vertical or the horizontal. So I assume that "tiltingly moved" meant it never became horizontal.

Q. Now, Dr. Knapp, I read you a quotation from Mr. Lyon's pretrial memorandum on file in this action, appearing on page 1, and I quote:

(Testimony of Robert T. Knapp.)

“The patent device is quite simple, consisting simply of a couch having an open section or slot in which is reciprocatedly mounted a flat applicator or pad to tiltingly move in the slot to manipulate or massage a portion of the body of the patient.”

Now, referring to the drawings of the Miller patent—one of the prior art patents in evidence here—does the device shown and described in the Miller patent, is that a couch or does it have a couch?

A. As I remember this, it is specified this unit 20 or 22 is a couch (indicating).

Q. And does that couch have an open sector slot?

A. Yes. I don't believe it has a number as such, but it is clearly shown here (indicating).

Q. Clearly in which figure of the drawings?

A. Figure 4.

Q. In that slot is there reciprocatingly mounted a flat applicator or pad? [241]

A. There is a flat applicator or pad mounted so it could oscillate. I assume that would be synonymous with reciprocate, the way it is meant.

Q. Well, I was simply asking you as to the structure. Does it have in the slot a flat applicator or pad? A. Yes.

Q. That is what element in Figure 4?

A. That is element 27.

Q. Does that applicator or pad in the Miller patent tiltingly move in the slot to manipulate or massage a portion of the body of a patient?

(Testimony of Robert T. Knapp.)

A. Yes, it tiltingly moves.

Mr. Harris: You may cross examine.

Cross Examination

Q. (By Mr. Lyon): Dr. Knapp, how long has it been since you were instructor of mechanics?

A. Instructor of mechanics?

Q. Mechanism.

A. Mechanism was one of the earliest courses I was instructor in. Probably 25 years.

Q. Now, directing your attention to Exhibits 16 and 17, I believe it was your testimony that in one cycle of these devices, these two arms which are——

A. 11 and 11-A. [242]

Q. ——11 and 11-A are locked together by the clutch so that they move in unison, is that correct?

A. No, that is not correct.

Q. What is incorrect about it?

A. The arms themselves have no connection with each other at any time. They are driven by pitmen, individual pitmen, which—one pitman drives 11, one pitman drives 11-A.

These pitmen are caused to reciprocate by two separate eccentrics which are on a separate shaft. Not this shaft, but a shaft on another part of the machine (indicating).

Q. There is just one shaft, is that correct?

A. One shaft.

Q. There is just one belt that drives that shaft?

A. Just one belt that drives that shaft.

Q. Just one motor that drives that belt?

(Testimony of Robert T. Knapp.)

A. Yes.

Q. And that shaft then in one cycle—the first cycle, I believe you said,—drives these two supports 11 and 11-A in unison, is that correct?

A. Drives the two supports in unison, that is correct.

Q. If I laid a board across those four pads and we were in this first cycle so the supports 11 and 11-A are in unison, would you then say that that board which I have laid across the top is being caused to move axially of the couch? [243]

A. I would say the board could be considered to move axially along the couch.

Q. Now, on direct examination you stated you measured six of these tables. One of your measurements was $2\frac{3}{4}$ degrees to one side and $\frac{1}{2}$ degree to the other side, is that correct?

A. That is correct, as I remember it.

Q. You criticized these exhibits here, and particularly Exhibit 19, because it just goes a very little bit of the distance past the vertical on one side and maybe two or three degrees past the vertical on the other side.

Wouldn't that indicate to you that Exhibit 19 is a pretty fair exemplar in that regard, of at least the Slenderella table whose movements you measured and found to be $2\frac{3}{4}$ degrees to one side and $\frac{1}{2}$ degree to the other?

A. I would not consider it a good illustrative example of how the general table functioned.

Q. All right. Now, what is wrong with it?

(Testimony of Robert T. Knapp.)

A. Because it does not represent the typical movement. It represents one limit possibly observed in the manufacture. A model should represent what the machine is designed to do on the average, not the deviations in the manufacturing process.

Q. All right. If it differs from what it is supposed to be—actually, this Exhibit 19, I believe, is supposed [244] to be a model, Keno-Matic model illustrative of Exhibit 17.

You don't criticize Exhibit 19 because of anything in connection with this piece that is supposed to represent the table, do you (indicating)?

A. I don't criticize anything about it. That is not illustrating the exact motion.

Q. Let's see how many pieces there are. There is this main frame piece, the table piece (indicating)?

A. Yes.

Q. There is this red piece that comes up here, like this (indicating).

There is the pitman, there is the eccentric, and then there are the various centers (indicating).

If this Keno-Matic model is wrong, one of those must be wrong. Which one?

A. Your statement is not correct.

Q. I think it is your statement that is not correct.

A. No. I say that you just stated one of these must be wrong.

Q. That is right.

(Testimony of Robert T. Knapp.)

A. It could be one of several or it could be a combination of two or three.

Q. All right. At least one of them must be wrong if there is something wrong with the model, is that right?

A. I say at least one of them is not made accurately. [245]

Q. Show me which one isn't made accurately.

A. It can be one of three, at least three. This could be slightly too long, between this point and this point (indicating).

This position can be slightly to one side or the other, or this position can be slightly to one side or the other (indicating).

Just as I know this throw (indicating) is too great on this eccentric, any one of these in a very slight amount can do it (indicating).

In other words, this is a sloppy model which introduces errors which distort the concept of the machine. That is why I am criticizing it.

Q. You are not prepared—of course, you realize this is made out of wood, is that right?

A. Well, I hadn't examined it closely enough to be concerned. I think it is—it looks like plywood.

Q. I will tell you it is plywood.

A. I am sorry to criticize your workmanship.

Q. No, actually it is Mr. Nickerson's workmanship.

A. I think it was my student's workmanship.

Q. It was. I just helped sandpaper some of the pieces.

(Testimony of Robert T. Knapp.)

You are not willing to put your finger on any one thing and say that that is wrong, is that right?

A. I couldn't tell from this drawing, in the first place, because this is not a construction drawing, which one is wrong.

Q. So far as being representative of anything you can get out of this drawing, this might be actually the perfect Keno-Matic model, isn't that right?

A. I am sorry, but that is not so. If you are skilled in the art of using assembly drawings which follow the convention, you would get quite a different picture out of this than is represented here; not quite a different—but you would not, shall we say, you would not accept a model which shows a motion to one side or the other,—

Q. Doctor, have you ever—

A. —when this is a questionable element of the case.

Q. Doctor, have you ever in your life held a position in a factory where they were making and selling things generally to the public or to the Air Corps, or anything like that?

A. I think you could easily see from the records in the reference books I have been a professor most of my life.

Q. You know how Mr. Nickerson is an engineer in a manufacturing company, is that right?

A. Many of my students are engineers in manufacturing companies.

Q. Don't you think he knows how to read a drawing?

(Testimony of Robert T. Knapp.)

Mr. Harris: If the court please, this is simply argumentative. [247]

The Court: Sustained.

The Witness: Might I add that the questioning has shown I was consulting engineer for many companies of this type who manufactured for sale.

Q. (By Mr. Lyon): Yes, but the point is you aren't personally called upon to put things together from a drawing and never have been in your professional life, is that true?

A. This is not true. I am an experimental research man. I have quite an elaborate shop of my own. My father was an operating engineer. I have done shop work all of my life. I went through the Los Angeles school system, through a very famous high school called the Polytechnic High School, which I took shop work of all types for four years.

The Court: The Polytechnic High School in Los Angeles?

The Witness: That is right, sir.

The Court: I still remember how it smelled around there, the odors of the foundries and things of that kind, some forty years ago.

The Witness: That was a wonderful development of Dr. Francis.

The Court: In that day it was strictly a polytechnic school.

The Witness: Yes.

Q. (By Mr. Lyon): Doctor, I believe you stated that the [248] motion which is intended to be illus-

(Testimony of Robert T. Knapp.)

trated by Exhibit C was different than any motion we found in any of the Slenderella tables that you examined, is that correct?

A. Let's see, which is Exhibit C?

Q. It is before you.

A. The only thing I remember stating about this, that is different from the Slenderella motions, was that the amplitude again was larger than any I measured.

Q. Yet that amplitude is supposed to represent what you would get if you were building what is shown in Exhibit 17, isn't that correct?

A. It probably represents what the draftsman measured from that drawing, which, as I said, was not a construction drawing and it might have shown a slightly larger amplitude here (indicating).

If you try to scale this drawing and then multiply it by the factor to bring it up here (indicating), you will find if you look at the division lines on a scale it would be rather difficult to estimate that closely.

Q. Comparing the motion of Exhibit C, the right-hand part of Exhibit C, and the motion of Exhibit 18, how do they compare?

A. Well, Exhibit C goes according to the convention and shows the oscillation taking place on equal sides of the vertical center line. This one does not. [249]

I am not making a severe criticism of this. I am saying it is distorted in a way which I do not think is correct, to bring into a case of this kind, when

(Testimony of Robert T. Knapp.)

this kind of an angle is a part of the thing in question.

Q. Now, this angle between the pitman and the vertical support—— A. Yes.

Q. ——not being 90 degrees, doesn't that indicate to you that of necessity there is going to be a greater movement to one side of the vertical than the other?

A. It does not. I shuddered when I heard my student say that; ex-student, I should say, I am sorry.

I think if counsel would note that if he would simply shove this whole bearing this way (indicating), he could make the thing oscillate on this side completely (indicating).

If he pulled it this way, he could make it oscillate on this side (indicating). If he would take care he could make it oscillate evenly around the center (indicating).

Q. That is correct. But beginning with the drawings we are supposed to be depicting in this device, Exhibit 18 is supposed to be——

A. One number is on one end and one on the other.

Q. I want 16. A. 16?

Q. No, this is 17, that is correct. This drawing with [250] the support being straight up in the air—I am talking about Section CC,——

A. Yes.

Q. ——the maximum eccentricity is straight down, right?

(Testimony of Robert T. Knapp.)

A. No. I don't know; this kind of a drawing I cannot tell on.

The Court: Would that make any difference under Claim 1 of this patent?

Mr. Lyon: I don't think so, sir, but what I am doing now is I am defending my exhibits. I am not worrying about the patent.

The Court: But I am. That is what I have to decide, the patent and the accused structure, and it seems to the court that the claim of the patent does not call for all of this elaboration of matters which might be one way or the other and still be within that claim.

Mr. Lyon: I agree with you. I won't belabor that any more.

Q. (By Mr. Lyon): Dr. Knapp, you said that the motion in the Stauffer patent was not a simple harmonic motion.

Do you care to make any statement as to how far it differs from a simple harmonic motion?

A. I would be glad to. Would you mind removing some of this stuff if you are not going to refer to it again, so I can get to my papers? [251]

Q. Yes.

A. I will try to make one more attempt to be a little clearer about what is simple harmonic motion. Another way of looking at it is we can say it is something of this nature (indicating).

The Court: You are going to do some drawing now? It looks as if you are.

The Witness: If I may.

(Testimony of Robert T. Knapp.)

The Court: You certainly may. But let's get it upon something we can retain here as an exhibit in the case.

Will the lines on here bother you (indicating)?

The Witness: No, I don't think so.

The Court: All right.

The Witness: My drawing of a circle would be so crude that—if we have a circle of this type (indicating), all we really need is a point moving in a circular path at a constant speed.

If this point—shall we call this point A —moving at a constant radius R , around the center C continuously, as it moves up here a given angle (indicating), if we would simply drop a perpendicular line down to a point on the diameter, and do this at each instant of time, as it goes around, then the trace of this point along the diameter (indicating) would represent simple harmonic motion.

In other words, it is the component of the motion of [252] this point in the direction of the diameter (indicating), when the point is going at a constant speed at all times.

When it is starting from this point (indicating) it is going straight up, the motion of the point of the diameter is zero. When it is at the top the motion is in the direction of the diameter, so the velocity is the greatest at this point (indicating).

As it comes down here the component gets less and less, until it comes back down here there is no motion, so this point oscillates back and forth here

(Testimony of Robert T. Knapp.)

(indicating), going the slowest at the two ends and the fastest in the middle.

Whereas, the acceleration is the greatest, forcing it to start from a stop here, moving in a direction toward the center, is the greatest at the outside and is zero in the center (indicating). This motion is called simple harmonic motion. It is a motion which we get approximately when we put a crank pin on here and connecting rod, and cause this end to move in a straight line (indicating).

It would be exactly the same if, instead of a connecting rod, we had a slot, like this (indicating), with a rod and this pin would fit snugly in the slot and would drive this rod back and forth (indicating).

The only difference is a slight difference due to the arc, the length of the connecting rod here (indicating), this point, which is on a diameter that corresponds—on the arc [253] —to a point a little bit advanced.

That is why we say it is, it differs slightly or more greatly from simple harmonic motion, as some of these distortions come into the picture.

Q. (By Mr. Lyon): Isn't another way of expressing that same thing, that simple harmonic motion, that it is the motion of a true pendulum?

A. A true pendulum, the motion of the true pendulum follows simple harmonic motion, but not in this picture.

Q. That is right. Now, will you explain the de-

(Testimony of Robert T. Knapp.)

gree of difference in the Stauffer patent mechanism?

A. I didn't make this drawing to become an exhibit, because it needs interpretation to know what my different sets of figures mean on here, but it is pretty evident from it what we are talking about.

Simple harmonic motion, the time required to make a half circle is the same as the time required to make the other half circle (indicating). That is, the two sides of the motion are symmetrical, going and coming, or shall we say from here around to here is the same as from here around to here, if we take the two extremes (indicating).

This is one of the prime characteristics of simple harmonic motion. We can have other motions that do that, but all simple harmonic motions have to do that. They have to be symmetrical, so that we could describe a degree of distortion [254] from simple harmonic motion by saying how much time it would require to go half the way around, compared with the time it required to go the other half the way around. That is what I tried to plot in the case of this Stauffer machine, from my rough picture.

What it amounts to is that this is the center line of the motion (indicating), and I have one, two, three, four, five, six large squares—this is time I am plotting along here (indicating)—represents the time required for simple harmonic motion to do a half cycle.

(Testimony of Robert T. Knapp.)

This light curve which I have here (indicating) is the Stauffer motion, and it is one, two, three, four one-half—well, it is approximately one more square. So that the Stauffer on this half, shall we say, (indicating), takes about $7/12$ ths of the time and $5/12$ ths of the time to go the other way.

Q. Which Stauffer?

A. This is the one that is labeled "Stauffer" (indicating).

Q. You say that is four. I count six.

A. The extra time required by the Stauffer machine, to go the same distance—extra time—it is the original time of the simple harmonic motion, plus this distance, plus this distance (indicating).

I was counting small squares. There are five small [255] squares and one large one in here (indicating). One, two, three and about a half.

Over here we have one and about a half (indicating); slightly less.

So I was saying this, plus this (indicating), is equal to one big square. There are six big squares. That makes seven big squares represent the time of the Stauffer to go one-half of the way on its cycle, and five squares then would represent the other half because there are 12 to make the whole business. So $7/12$ ths to $5/12$ ths is a very appreciable distortion of simple harmonic motion.

This gives a jerk. If you were experiencing this motion you would feel it as a jerky motion. That is why I referred to it as a quick return motion as used in machine tools.

(Testimony of Robert T. Knapp.)

Q. Dr. Knapp, in describing the Gunderman patent you noted that there was no gear reduction, is that correct?

A. Being an absent-minded professor I prefer to look at the patent.

Q. Here it is. A. Yes.

Q. There is no gear reduction?

A. I said I believe that unit 10 was a motor drive of unspecified type.

I don't believe I said there was no gear reduction, because I have no way of knowing. [256]

Q. Well, there is no gear reduction shown. Put it that way.

A. To my knowledge, for something like thirty years, motor manufacturers have made motors with integral gear reduction.

From the end view of a schematic drawing like this they would look just like that (indicating).

Q. Is it your opinion that the Gunderman patent intended to have a motor with built-in gear reduction?

A. I often wanted an Ouija board, but I have never found one.

Q. You know it is a fact, do you not, that Gunderman is a vibrating machine? It says so right there (indicating), doesn't it?

A. "Portable Vibrating Machine."

Q. And in this art, when they want vibration, do you have any idea what the rate of vibration is?

A. No, I know nothing about the process of removing excess weight or massaging people.

(Testimony of Robert T. Knapp.)

Q. But you are an expert on the patent here before the court, are you not?

A. I am trying to discuss the mechanical motion. I am certainly not discussing what the machine does to the human body.

Q. I am not asking you that. I am asking you if you [257] know what is the rate or range of rates in this art that we are operating in, and we are talking about vibration.

A. I have no knowledge of that. I know in some of the very early patents I read that the machine could be operated from 50 to 200 for one purpose and from, I think, 1,000 oscillations up for another purpose. I don't remember what they were. So I would say it would cover quite a wide range.

Q. Have you read the Miller patent, No. 1,953,424?

A. I have read all of these three patents at one time.

Q. I call your attention to the first paragraph on page 4 of the specifications of the Miller patent, the first full sentence reading:

“The operation of the motor causes the link, to which the strap is attached, to reciprocate rapidly, thus imparting to the strap a vibrating motion, the vibrations being equivalent to the speed of the motor which is preferably about 1,700 R.P.M.”

Now, does that indicate to you that when they want a vibrating machine, as distinguished from a manipulating or a massaging machine, that there would be no gear reduction employed?

(Testimony of Robert T. Knapp.)

A. It indicates to me that Mr. Miller was considering his machine to be operated at 1,700 R.P.M. and causing vibrations of that frequency. Beyond that it doesn't give me any [258] ideas.

Q. Using that as a clue, it would give you an idea that certainly Mr. Gunderman didn't want any gear reduction in his vibrating machine?

Motors about the time, January 29, 1929, generally ran at 1,700 R.P.M., didn't they?

A. This was one of the common speeds. There are quite a few. I have had occasion to use quite a few motors. It is never 1,700. It is a slip from 1,800, depending upon the efficiency of the motor. Usually about 1,760.

Q. Now, turning our attention again to Gunderman, the top of the element 26 is curved, is it not?

A. Yes.

Q. Do you know what the center radius curvature of that curve is?

A. No, I haven't checked it. To my eye it would appear, oh, somewhere around the pivot point 40.

Q. You demonstrated a model yesterday—supposed to be a model, Keno-Matic model—of this device? A. Yes.

Q. And you noted that when you turned it that the unit 26 followed the outline very accurately, isn't that right?

A. I didn't notice exactly. As I say, I think it appears about that. I could easily check it on the model. [259]

(Testimony of Robert T. Knapp.)

Q. Well, we will do that.

A. I would say within the limits of accuracy of the drawing that this is pivoted around this point (indicating).

Q. So that is fair to say, is it not, Doctor, that there is no lifting action imparted by the operation of the Gunderman device to anything resting upon the member 26?

A. I would have to ask you what you mean by "lifting." Let me illustrate——

Q. There is no component force in the vertical direction, is there?

A. If you are talking about a rigid body that this slides underneath, I would say there is no lifting action. A rigid body will not move up or down.

Q. Now, did you make these models?

A. No.

Q. Do you know who did?

A. I have heard the name. I do not know the person, I have never seen him.

Q. I show you the Keno-Matic model, Defendant's Exhibit H, of the Miller patent. A. Yes.

Q. In direct testimony I believe you stated that the pad 27 of Miller is adjustable about the pivot 32. What do you mean by "adjustable?"

A. Movable. [260]

Q. Freely movable, isn't it?

A. I have no idea. From what this shows it could be on a clamping screw or it could be on a free pivot or it could be on a tight one; I don't know.

Q. Have you read the specification?

(Testimony of Robert T. Knapp.)

A. I would have to look to refresh my mind on that detail.

Q. I will refresh your mind. On page 2, column 1, of the Miller patent, No. 1,953,424, appears the following:

“The purpose of the pivoted joint between the pad 27 and the clip 31 is to allow the pad to adjust itself to the body when in operative position.”

Now, wouldn't that indicate to you it was a free pivot?

A. It would indicate to me it was not clamped.

Q. That is right.

A. It could be free or not; tight.

Q. It is proper to say then this mechanism here is articulated, isn't it?

A. I think we could say that——

Q. All right.

A. ——not quite knowing what the word means.

Q. When you have such an articulated system and you move this through a degree, causing that to rise (indicating), and there is a heavy object on the top of this pad 27 (indicating), that pivoting will permit the link arm between the [261] pivot 32 and the top of the pad 27 to turn, as this link 35 (indicating) is raised, so that the resultant is a movement in a straight line upward of the pad 27, isn't that correct?

A. If I would—how shall I say it—build a rigid structure on the pad 32——

Q. Suppose there is a man's back sitting there.

(Testimony of Robert T. Knapp.)

A. A man's back? I wouldn't have much of any idea, because it is a very flexible sort of a thing, like a sack of sawdust. I wouldn't know what—

Q. If there was a man's back on this, in the first place the pad would be flat to conform to his back, in accordance with what I just read in the patent, wouldn't it?

It would adjust itself to his back because of the pivot?

A. Yes, it wouldn't be flat. I should say my back isn't flat, from what I can remember of it.

Q. All right. As we pivot the link 35 counterclockwise and the end of that pivot tends to traverse somewhat to the left, that will be compensated for by a pivoting of the member 27 in a clockwise direction, will it not? That is engaging—

A. Are we talking about relative or absolute motions? I mean, are we riding on this arm 33, or are we looking at it as we stand or as we feel it as if our back were against this pad?

This relative and absolute motion is a mess. I don't [262] quite see what you are after.

Q. What I am getting at, Doctor, is if there is a man's back here (indicating), and you raise the link 35, or, 33, vertically,—I mean pivot it in a counterclockwise direction, a man's back pressing upon the pad 27 will cause the pad to have a relative motion about the pivot point 32?

A. A relative motion—

Q. In a clockwise direction.

(Testimony of Robert T. Knapp.)

A. In a clockwise direction? If we pile all these ifs together, yes.

Q. The only if is a man with his back on it.

A. Rigid back?

Q. Yes.

A. I don't know what a man's back would do. That, as I say, I am not a physician or a physical culture man.

Q. As a practical matter then, what happens is that the pad is merely pushed upward, isn't that correct?

A. I think as a practical matter the motion is pretty complicated, because this pivot point 32 is going to move in an arc.

I think the whole business is going to slide on the man's back because I think you have too many motions.

Q. There may be some slide, Doctor. But isn't this main motion just an upward push?

A. I think the main motion is a push along this arc [263] (indicating).

Q. The patent, I believe, again gives us a light on that, I think, Doctor. It says on page 3, column 1, about line 17:

"When the motor is started it creates a pulling action on the straps which has the effect of imparting a contracting and expanding manipulation to the chest and abdomen and at the same time produces an upwardly pressing movement against the spine."

(Testimony of Robert T. Knapp.)

So the patentee thinks he is getting an upwardly pressing movement, isn't that right?

A. I would say the patentee thinks he is getting an upwardly pressing movement.

Q. Again, in the same paragraph, a few lines later:

“The chest and back pads 28 and 27, respectively, operate in unison, that is, as the chest straps are pulled downwardly to contract the chest, the back pad 27 simultaneously presses upwardly against the spine.”

So we have that same concept repeated twice there.

A. I don't know what the strict meaning of the word “upwardly” is. I could say in an approximate vertical direction.

What the man says and what this motion does may be two different things, just as in the Stauffer patent. I cannot give testimony on what the man says. [264]

Q. With respect to Exhibit K, how did you happen to pick two degrees on each side of the Slenderella motion?

A. I picked the two degrees on each side on the Slenderella motion because in measuring up the five units of the one type of machine and the one unit of the other, I saw that the total motion was less than four degrees, and that the average motion was symmetrical about the vertical.

So I suggested that this be made to show an arc

(Testimony of Robert T. Knapp.)

that would include the widest motion for which either machine was designed to operate.

Q. Of course, actually, Exhibit K does not conform to any of the machines you saw, does it?

A. No. The arc is slightly larger than any of the machines. This was not a Keno-Matic model of the machine, as you remember.

Q. Referring again to this Miller patent and comparing it to any of the others here in evidence, Gunderman, Parker, or to the patent in suit, the pivot of the arm 35 is about point 41, isn't it?

A. Yes.

Q. And the arm extends from the point 41 at an acute angle of the horizontal, does it not?

A. Yes, at an angle to the horizontal. I don't know what you mean by "acute" here.

Q. You know the difference between an acute and obtuse [265] angle? A. It is an angle.

Q. It is a small angle with a variable.

A. You said from the horizontal.

Q. From the horizontal, that is what I meant.

A. I was trying to decide whether it was this angle or this angle (indicating). You said an angle from the horizontal. I think that is sufficient.

Q. All the rest of these devices have got the pivot point down at the bottom, haven't they?

A. As I remember it, one version of Gunderman has the pivot point in the middle.

Q. Well, the pivot point is directly below the maximum height of the device. In other words,

(Testimony of Robert T. Knapp.)

directly below the applicator when it is in the vertical position.

That is true in Parker, that is true in Gunderman and it is true in Stauffer, is it not?

A. Except the Stauffer specifies that it never gets in the vertical position.

Q. All right. My point is that in Miller we are operating on this cycle of an arc, wherein most of the motion is vertical, where the vertical component of the motion is much greater than the horizontal component.

Whereas, in all these other devices, we are operating on this part of the arc (indicating), wherein the horizontal [266] component is much greater than the vertical.

That is a fair statement, is it not, Doctor?

A. In this connection I think I would have to call your attention to the fact that the angle which is important has nothing to do particularly with the arm 35. The angle which is important is the angle between the point 41 and the applicator 32.

Q. Doctor, I asked you if it wasn't true, if it wasn't a fair statement, that in Gunderman, Parker and Stauffer we are operating on the part of the arc being more nearly directly above the pivot point.

Whereas, in Miller we are operating on the part of the arc more nearly directly disposed horizontally, aside from the pivot point, so that in Gunderman, Parker and Stauffer we are operating it on an arc which has a larger component of motion in a horizontal direction.

Whereas, in Miller we are operating in an arc

(Testimony of Robert T. Knapp.)

which has a larger component of motion in the vertical direction. Is that not a fair statement?

A. Mr. Lyon, I am not trying to quibble. I am trying to bring out a point which I think is confused here, and that is that the motion we are concerned with is the motion of the applicator.

I could draw a support for one of these others in which the arm would start out horizontal and come around with a [267] curve to this other, and we would get the same motion, so that I have to go back to the arc from the point 41 to some point on the applicator, to find out what it is all about.

Mr. Lyon: No further cross examination.

Mr. Harris: No redirect, your Honor. May the witness be excused?

The Court: The witness is excused.

(Witness excused.)

The Court: Mr. Clerk, call our 3:00 o'clock case, and in between witnesses of this case will be a good time to handle a further pretrial. In the case on trial, Stauffer v. Slenderella, we will take a ten-minute recess.

(Whereupon, a recess was taken from 2:50 o'clock p.m. to 3:25 o'clock p.m.)

Mr. Harris: If the court please, at this time I would like to offer some further patents. These are the file wrapper references which were considered by the United States Patent Office in connection with its consideration of the Stauffer patent in suit. I shall identify them.

First, for identification as Defendant's Exhibit

L-1 is a patent, a U. S. patent to Taylor, No. 86,604;

Next, as Defendant's Exhibit L-2 is a patent to Hardy and Gibson, No. 1,276,526;

Next is a patent to Hardy, No. 1,391,893, which would be Exhibit L-3; [268]

Next is a patent to Iverson, No. 1,602,196, which would be Defendant's Exhibit L-4;

Next is a patent to Rosenquist, No. 1,616,065, which would be Defendant's Exhibit L-5;

Next is a patent to Torrence, No. 1,910,135, which would be Defendant's Exhibit L-6;—

Mr. Lyon: Does that complete the list?

Mr. Harris: No.

Next is a patent to Hardy, No. 1,999,412, which would be Defendant's Exhibit L-7;

Next is a patent to Snyder, No. 2,036,371, which would be Defendant's Exhibit L-8.

(The documents referred to were marked Defendant's Exhibits L-1 to L-8, inclusive, for identification.)

Mr. Harris: I offer those into evidence at this time on behalf of the defendant.

Mr. Lyon: If the purpose of this offer can be limited to merely showing what was before the Patent Office, I have no objection, but if the patents are to be received without limitation, I object to the receipt of the patents on the ground we have had no notice as required by law. They cannot be considered on the question of invalidity of patent.

Mr. Harris: We offer them generally, if the court please, because, of course, the plaintiff has

had notice of these patents—they are part of his file wrapper—since he got [269] his patent.

We offer them for any purpose. We are not going to adduce any testimony with relation to them, but we offer them for any purpose.

Mr. Lyon: Well, the law requires the defendant to give the plaintiff notice 30 days in advance of trial of any patent which it is going to rely upon. I have never even seen those patents.

Mr. Harris: Subject to, of course, any direction from the court. In other words, it is within the court's jurisdiction, under the statute, to admit the patents if the court believes they are relevant and if the plaintiff or its counsel have had notice of patents as such.

The provision of the statute is merely to provide that the plaintiff in a patent case shall have had notice of the patent prior to trial. And, of course, these patents, having been cited in connection with his application, he has had notice since 1938.

Mr. Lyon: You are perfectly aware that is no notice you intend to rely on those patents.

The Court: Are they cited in the Stauffer—

Mr. Harris: In the Stauffer file wrapper, yes, your Honor. They are all cited in the Stauffer application file wrapper.

Mr. Lyon: If the receipt of these patents can be limited, [270] having before the court and showing the court the art considered by the Patent Office, I have no objection.

If it is not so limited, I do, and insist my objection is well taken.

The Court: We will admit them and limit, as Mr. Lyon suggests, at this time. I am inclined to think that limitation should be removed. I just want to check in some authoritative work before allowing them in generally, because it does appear that it is unnecessary to give a person notice of that of which he is already informed.

Mr. Harris: Yes, your Honor. Thank you.

The Court: Of course, he isn't informed specifically that you are going to rely upon these. Apparently the patent examiner didn't rely on them. He considered them and rejected them as anticipations.

Mr. Harris: Well, he used them very widely in considering the Stauffer application for a patent and Mr. Stauffer's attorney amended the application repeatedly to avoid the rejection of his claims upon these very patents.

I might say that also there is one more file wrapper reference which I haven't offered in this group, and that is the Parker patent, which is already in evidence in the case. There is no point in encumbering the record with another copy of that same patent.

The Court: They are received and will be received for [271] the limited purpose indicated, until and unless the court makes further order.

(The documents heretofore marked Defendant's Exhibits L-1 to L-8, inclusive, were received in evidence.)

[See Book of Exhibits.]

Mr. Cox: Dr. Fishbein.

WILLIAM I. FISHBEIN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please take the stand.

Will you state your name, sir?

The Witness: William I. Fishbein.

Direct Examination

Q. (By Mr. Cox): What is your address, Dr. Fishbein?

A. 7853 South Shore Drive, Chicago, Illinois.

Q. Are you a licensed physician?

A. I am in the State of Illinois.

Q. Would you please state briefly, Dr. Fishbein, your academic record.

A. I graduated from the University of Chicago in 1921, bachelor of science; from Rush Medical College in 1923, Doctor of Medicine. I interned for two years at Michael Reese Hospital in Chicago.

From 1925 to 1931 I was school physician, part-time physician with the laboratory schools of the University of [272] Chicago, and also engaged in private practice during that period.

From 1931 until 1935 I also was in general practice and was working part time at the Chicago Board of Health.

Q. I just asked you at the moment for your academic background. A. Oh.

Q. Following 1935, Dr. Fishbein, what has been your experience in the field of medicine? I think you related it up to 1935.

(Testimony of William I. Fishbein.)

A. From 1931 to 1935 I was acting as director of surveys in the Chicago Board of Health. And from 1935 until 1956 I was the epidemiologist for the Chicago Board of Health. At the same time I was acting as consultant for a number of commercial firms, pharmaceutical houses, including Abbott Laboratories, McKesson-Robbins, Belchio Corporation, Chilean Idene Educational Bureau, International Latex Corporation, among others.

Q. Are you a member of any medical associations?

A. I am a member of the Chicago Medical Society, the Illinois State Society, the American Medical Association, the American Public Health Association.

Q. Dr. Fishbein, are you employed by the defendant in this case, Slenderella Systems of California, Inc.?

A. No, I am not. [273]

Q. Have you been employed or connected in any sense with any Slenderella companies related to the defendant?

A. Yes, I have been a part-time consultant with Slenderella; I think the home office is in Stanford, Connecticut.

Q. Are you familiar, Dr. Fishbein, with the two Slenderella tables which are illustrated in this case by—

A. Yes, I am.

Q. —Exhibits 16 and 17?

A. I am quite familiar—

Q. You might wait until I finish my question.

(Testimony of William I. Fishbein.)

A. O.K. I am quite familiar with the operation of the tables.

Q. From your observation of the two tables, Doctor, would you say the external movements of the tables are identical or substantially identical?

A. Yes, from my observations I believe that the motion imparted to the pads at the top is the same in both types.

Q. As a matter of fact, there are three separate and distinct motions to the Slenderella table, are there not? A. Yes, sir.

Q. One, a motion backward and forward of the entire top of the table; and secondly, an alternating motion of the two pads inserted in the top of the table, and thirdly, the two pads moving in unison back and forth on top of the table? [274]

A. That is correct, those are the three motions.

Q. In the following questions, Dr. Fishbein, I am going to advert exclusively to this last mentioned motion, which is the two pads moving in unison within the top of the table. And for purposes of convenience I will refer simply to the Slenderella table, in the singular, is that clear? A. Yes.

Q. Can you describe briefly what your experience has been in connection with the Slenderella table?

A. During 1955 and part of 1956 I made a study of 50 women who took regular treatments on the Slenderella tables. We conducted the study to determine what effects we might get, exclusive of any

(Testimony of William I. Fishbein.)

dietary regulation, so that these women continued with their regular dietary practices.

They visited the office. These were not conducted in the salon, but in the physician's office, away from the salons. They visited the salons two or three times a week. At the end of a six-month period we had obtained an average weight loss in the neighborhood of seven to eight pounds, and a change in the abdominal measurement of about 2½ inches.

The Court: Without diet?

The Witness: No dietary regulations at the time.

Q. (By Mr. Cox): Is your familiarity with the table, Doctor, sufficient to enable you to form a medical opinion as to the effect of the table upon users? [275]

A. I believe that it is. I have observed enough women using the table and made enough studies to determine what effects we are getting.

In addition, we are now conducting a second study to determine if we get any improvements in muscle strength. Those studies are only in progress and I can't make any statement now about the result we may get.

Q. Have you had occasion to read the specifications and claims of the patent in suit, with particular reference to the medical and therapeutic and physical claims made by the patentee Mr. Stauffer?

A. Yes, I have.

Q. The following questions, Dr. Fishbein, are going to relate to those physical and therapeutic

(Testimony of William I. Fishbein.)

claims to the patent in suit, as related to the Slenderella table.

In your opinion, is the defendant's table capable of alleviating pain due to nerve stricture arising from maladjustment of any of the vertebrae by the user?

A. I would not believe that it would have that effect, and I would be very fearful that it might make such pains worse, rather than better, because if there is pressure on nerve roots, on the nerves as they come from the spine, the spinal cord, any compression or movement of the spine in any direction would be apt to make such pains worse, to increase the pressure on the roots, and certainly would not be [276] advocated.

Q. Is the Slenderella table capable of alleviating pain by the massage of any of the muscles of the spinal tract?

A. Since the Slenderella table is not designed for massaging, it couldn't do anything in the nature of massaging.

Q. In particular is defendant's machine capable of alleviating pain by the massage of the erector spinae, or the semispinalis, multifidus or latissimus dorsi?

A. No, the table doesn't produce massage and, therefore, would not have any effect in relieving pain by a process of massage.

Q. In your opinion is the defendant's table capable of alleviating strictures in whole or in part?

(Testimony of William I. Fishbein.)

A. No, it would not alleviate any, any pressure effects that were occurring on nerve roots.

Q. In your opinion is the defendant's table capable of alleviating pain or discomfort due to pain from sagging or fallen internal organs.

A. Inasmuch as the table only gives exercise, it certainly could not alleviate any pains that were due to displacement of the intra-abdominal contents.

Q. Is the defendant's machine capable of strengthening any of the abdominal muscles of a user?

A. That is the point that we are trying to determine now by actual measurement. [277]

Now, since the table does have an effect of producing passive exercise and exercise is known to strengthen muscles, it is quite possible that some effect would be produced.

But until we have the exact evidence I would hesitate to say whether it could or it could not.

Q. That is the subject of the tests being presently conducted? A. At the present time.

Q. Is the defendant's table capable of a strong and repetitious differential of lifting or upstroking of muscles?

A. No, the machine doesn't operate that way. There is no lifting or upstroking. There is merely a—I think probably would best be described as a shaking.

Q. Is the defendant's table capable of relieving tension created by the stretching of any organs or supporting tissue?

(Testimony of William I. Fishbein.)

A. No, the effect is only on the muscle groups and those are the external muscles of the body.

Q. In your opinion is the defendant's machine capable of permitting such tissue and correlated muscular support to regain any lost strength?

A. Since it doesn't have any effect on them, it certainly couldn't alter their structure in any way.

Q. Does the Slenderella table tend to place any of the internal organs in a normal position after having been [278] removed from such normal position by reason of any weakening of the supporting tissue therefor?

A. No, I don't believe there is any table or any kind of exercise that would do that. I think it would probably require some surgery.

Q. In your opinion does the use of the Slenderella table alleviate pain and distress due to strictured nerves and blood supply?

A. Again, since, in order to relieve pressure on strictured nerves you would have to have constant stretching of the spine, I don't think that we would attain it with the Slenderella table.

Now, strictures of the blood supply are rare, without the development of gangrene, since if you cut off the blood supply the tissues will surely die.

I can't imagine any state where the blood supply has been cut off and any physician would rely on exercise to restore it.

Q. In particular will the defendant's table alleviate pain and distress due to stricture of the

(Testimony of William I. Fishbein.)

nerves and blood supply resulting from maladjusted vertebrae?

A. No, I think that the chances would be that we would only further maladjust maladjusted vertebrae.

The motion is contraindicated when we have dislocations of the vertebrae or when there is a protrusion or injury of [279] one of the intervertebral disks. The motion is contraindicated and would be harmful.

Q. In the use of the defendant's table is the movement of the pads thereon imparted to a body lying thereon accentuated in that its greatest thrust or lifting is in one direction only?

A. Would you read that again?

Q. In the use of the defendant's table is the movement of the pads thereon imparted to a body lying on the table accentuated in that its greatest thrust or lift is in one direction only?

A. Not by any means. The motion is equal in both directions and there is no lift.

I don't know whether you would call shaking a thrust in both directions. I suppose it would be possible to consider it that way.

Q. In the Slenderella table is there any positive upward and forward lift of the pads on the table?

A. No, there is no lifting.

Q. In the use of the defendant's table are any of the internal organs of the user lifted toward their normal position?

A. I suppose that if some of the abdominal con-

(Testimony of William I. Fishbein.)

tents were loose—and they usually of course are not, they are fixed except some sections of the bowel—as the table moves [280] toward the head it would shake them up there.

But the moment it moved back the other way it would shake them in the other direction equally as much, merely because by the force of gravity they would tend to stay where they are and until you put some force on them they wouldn't change position.

The Court: Aren't they pretty well anchored down, anyway?

The Witness: Yes, they are. It would be a sad thing if the internal organs were loose. Of course, the bowel isn't tightly fixed.

Q. (By Mr. Cox): In the use of the defendant's machine, Dr. Fishbein, is tension relieved in the supporting tissue for any of the internal organs? A. I didn't hear that.

Q. In the use of the defendant's machine is the tension relieved in the supporting tissue for any of the internal organs? A. Not at all.

Q. You understand that the reason some of these questions may appear rather complex is that I am following the language of the patentee in the specifications of the patent. A. Yes.

Q. Is such supporting tissue rested and strengthened? A. Not by any means. [281]

Q. In the use of the defendant's table are any of the internal organs gently lifted upwardly or towards the head of the patient, and then released?

(Testimony of William I. Fishbein.)

A. Not at all.

Q. In the use of the defendant's table are any of the user's internal organs constantly lifted toward their original position?

A. Well, since the organs rarely get out of their position, and since these tables are not used for the treatment of any abdominal condition, certainly, I would say the answer is no.

Q. Does the defendant's machine release tension upon strained tissue, giving nature an unrestricted opportunity to return any of the organs to normal position, and function?

A. I think it would have just the opposite effect.

Q. Would your answers to any of the foregoing questions about the use of the defendant's machine be any different if I had specified that as a condition of the use thereof the person using the same was lying on the machine in a position similar to that shown in Figure 1 of the Stauffer patent in suit, with his knees bent as shown there?

A. It would make no difference which way—

Q. You are familiar with that Figure 1 of the patent?

A. Yes, I am. It would make no difference in which position he would lie on the table. [282]

Q. I beg your pardon, Doctor?

A. I say, the position on the table would make no difference in the end effect with the table.

Q. Does the use of the Slenderella table relax any of the muscles of the spinal tract of the user?

A. No, our Slenderella table doesn't relax any-

(Testimony of William I. Fishbein.)

thing. It exercises, and exercise indicates a state of contraction rather than relaxation.

Q. In the use of the defendant's machine do such muscles of the spinal tract of the user become soft and pliant?

A. No, the effort on the part of the system is to make the muscles not soft and pliant, but to increase their tonicity and strength.

Q. From your study of the Slenderella table and in your opinion would the user of such a machine aid directly or indirectly the action of the heart of a user?

A. Of course, all exercise, no matter type, has the same effect. Exercise increases the rate of the heart beat, increases the rate of respiration and would speed up the rate of flow of the blood.

Now, for the normal heart and the normal individual those processes are going on every day. Your heart beats faster when you move around than when you are sitting quietly.

But for the individual with an abnormal heart these [283] increases in rate might be dangerous, and the Slenderella system would never be applied for anyone who had any circulatory difficulty, and particularly if there were a disturbance in heart function.

Q. Is the defendant's machine adapted to forcibly lift the body of the user in a direction toward his head, a distance of approximately two inches, and then return the body to the point of beginning?

(Testimony of William I. Fishbein.)

A. It doesn't lift at all, it merely moves the body back and forth or moves the muscle groups.

Q. In the use of defendant's machine, is there any relief of tension on the weakened tissue of the body? A. Not at all.

Q. In the use of the Slenderella table, is a human body thereon moved in a greater degree, or the principal effect, in one direction of movement of the pad than in the other direction of the movement of the pad?

A. Movements are almost exactly the same in both directions.

Q. In a word, what would you characterize, Doctor, as the chief or principal physical or therapeutic characteristic of the Slenderella table, as you have observed it in operation?

A. Merely to give passive exercise. There is also some active component, since when any muscle is moved the [284] opposing muscle contracts in order to keep the movement from going too far. It is almost a reflex action. It is called the stretch reflex and depends on prolonged tendons. But by far the greatest effect is just passive exercise.

Q. As described by you, the Slenderella table has no apparent therapeutic or medical effect which you have observed?

A. It has never and would never be employed for any. Any therapeutic or medical effect should be carried out under the directions of a physician, and only under his directions.

Mr. Cox: You may cross examine.

(Testimony of William I. Fishbein.)

Cross Examination

Q. (By Mr. Lyon): Dr. Fishbein, what was the nature of the consulting work which you were employed to do for the Slenderella System of Stanford, Connecticut?

A. I was employed for a number of purposes. One was to prepare a series of diets for reducing purposes.

The second part of my employment was to educate the operators in the Slenderella salons, to give them some basic information relative to exercise and the effects that might be produced by the tables.

And then there are some matters connected with nutritive products.

Q. Do you have a proprietary interest in the defendant or any of the other Slenderella associated companies? [285]

A. Not at all.

Q. You are not a stockholder in any Slenderella Company?

A. Not at all.

Q. Do you obtain a regular retainer from any of the Slenderella organizations?

A. I obtain a retainer for services which I render to them.

Q. Were you here on the opening day of trial?

A. Yes.

Q. Did you see that motion picture?

A. Yes.

Q. Did you notice during the portrayal of the picture the X-ray shots?

A. I did.

Q. Do you disagree that the picture, by diagram and also by picture, indicated a flexing of the spine

(Testimony of William I. Fishbein.)

and opening up of the distance between the various vertebrae?

A. Well, since that motion picture went very rapidly I certainly would never base any scientific opinion of any kind on seeing it. In order for me——

Q. I didn't ask you that, Doctor. I asked you whether you disagreed with the picture when it makes that claim.

A. I refuse to comment on that picture because I couldn't tell what was happening. It went so rapidly that I [286] had no idea.

Q. Now, you recall a part of the picture was in diagram? A. Yes.

Q. And that diagram purported to show an opening up and a closing of the distance between the vertebrae of the spine, as the treatment was given.

Do you agree or don't you agree that such an effect occurs when a patient is on a Slenderella table?

A. I would absolutely be unable to tell until I made the same type of observations on a patient who was on the Slenderella table.

Now, I might say that to stretch the spine and to bring about any noticeable variation in the interspaces between the vertebrae is practically an impossibility, without either fracturing something or injuring the disks.

The spine remains a fairly rigid structure. The inter-vertebral spaces only become altered when you

(Testimony of William I. Fishbein.)

take one of the disks and pull it out of place or it is ruptured or protrudes or herniates.

For the spine to separate to any degree, where you could notice it in an X-ray plate, it just doesn't occur in medicine.

Q. You mean that when a person bends over that—— A. There is merely—— [287]

Q. ——the spine does not open up on one side and close on the other?

A. No, there is merely a sliding of the intervertebral spaces, one over the other, and the change in contour is very slight.

You do have an alteration in the total structure, certainly, when you are in a bent position than when you are in an upright position, but the change is so slight that you can't see those things and certainly you don't see them in this movie and this X-ray.

Q. Did you observe in the movie a manipulation of the rib cage?

A. In the movie I saw some movement of that female body in various directions. I don't know what was producing them.

I certainly would never rely for any scientific evidence on a movie, because I have to see the thing myself before I draw any opinion.

Q. You did, however, notice a manipulation of the rib cage?

A. I noticed the rib cage moving. Now, whether the movement was due to the manipulation or

(Testimony of William I. Fishbein.)

whether she was taking a deep breath each time I couldn't tell that.

I could only tell it after I saw the patient or the person on the table. [288]

Q. Is it your opinion that the treatment of a patient who is suffering from a forward dip of the pelvis on a Slenderella table would not have any effect towards moving that pelvis back into its normal position?

A. Well, first, let me say that so far as I am aware in scientific medicine we don't have any term called "forward dip of the pelvis".

Now, it may be possible that the pelvis may tip anteriorly, but the effect would be produced primarily because of an original disturbance in the spinal column, and to manipulate the pelvis in order to force the spine back into position just wouldn't work out.

The vertebrae are in alignment, they are always in alignment unless we have some severe injury. We do get abnormal curvatures, particularly forward bending of the lower part of the spine.

But in order to correct that would require a great deal of voluntary effort. You could exercise for days and days and days, and unless the individual made a voluntary effort to stand up straight his spine wouldn't be pulled back in the normal position.

And in the same way, the pelvis is not going to be pulled back in the normal position without voluntary effort. Now, you could possibly strengthen

(Testimony of William I. Fishbein.)

muscles by table treatment, by passive exercise, so that once the structures were brought [289] into normal position it would be easier for the individual to keep them there.

But how extensive that is in the Slenderella table or any other table, or any system of passive exercise, of which there are thousands, I couldn't tell you because, as I said, we are just now engaged in making some measurements to see if passive exercise is really a factor in producing increased muscle strength.

Q. I believe you did agree, did you not, Doctor, that a patient taking a treatment upon a Slenderella table might have an increased rate of the flow of his blood?

A. Yes. But the same thing would happen if the patient merely walked down the street or took any kind of exercise; it wouldn't make any difference what type.

Q. Have you ever been in a gymnasium, such as Vic Tanny Gymnasium?

A. I have never been in a Vic Tanny. I think I maybe, in my younger days, have gone to the Y.M.C.A. I have been in school gymnasiums.

Q. As a doctor, have you ever prescribed that a person should attempt to create a better condition in his body by working out in a gymnasium?

A. No, no, that would be the last place I would send them, because people are bored with gymnasiums and they won't go and they won't stick to it. [290]

(Testimony of William I. Fishbein.)

Q. As a doctor, have you ever prescribed that a person should hang by their hands from an overhead bar?

A. No. If you are trying to produce an effect on the spine, that would not be the way you would do it.

In order to produce an effect and make it be permanent or helpful, you would have to put them in traction, which means that you would have to suspend them by their neck and maintain variation on that for varying periods.

That is often done by the orthopedist, in order to relieve the so-called strictures of the spinal nerves.

Q. Well now, with a person lying flat on a Slenderella table, and in the first position in which the applicators or pads are beneath the buttock of the patient, and were in the cycle wherein all the motion is in unison on the forward motion, that is, toward the head of the applicators, there is a stretching of some of the muscles, is there not?

A. I don't think that you would stretch any muscles. What you would do is merely shake them, and if you had any resistive elements in this it would be a contraction of the muscles, not a stretching.

The only way you can stretch a muscle is to pull it beyond its capacity during the relaxing phase. The muscle when relaxed is the longest. When the muscle is contracted completely it is the shortest; it gets short and thick.

(Testimony of William I. Fishbein.)

Now, you say "stretch the muscle". That [291] would imply pulling it either from its origin or from its insertion. And you couldn't stretch it unless you were able to get hold of the tendon and do that to it.

Q. Now, when a person is on a table in the position I indicated, the major portion of his body is on the stationary part of the couch, is it not?

A. Yes.

Q. Does that not serve as an anchor against which—

A. No.

Q. —we pull when we elevate the part that is being shaken?

A. No, it doesn't act as an anchor because the body moves back and forth. If you will even look in your own motion picture you will see that the body is not firmly fixed even to your own table. That is only an opinion of what I could see of that picture, and it wasn't too clear.

But on the Slenderella table, the body certainly is not anchored at either end.

Q. The Slenderella System, do they ever use sandbags?

A. Not that I know of.

Mr. Lyon: That is all.

Mr. Cox: No redirect.

Mr. Harris: The court please, may the witness be excused.

The Court: Yes, this witness is excused.

(Witness excused.) [292]

Mr. Harris: At this time, if the court please, on

behalf of the defendant I move to strike the motion picture which is Plaintiff's Exhibit 3, on the ground that there has been no foundation laid, it is irrelevant, it is immaterial, and it is, so far as the masthead is concerned and so far as the sound track is concerned, entirely hearsay so far as these defendants are concerned.

The Court: The motion is denied, but in denying it the court recognizes that the masthead and the commentary are hearsay.

But still it is orienting matter, much as much of the colloquy and statements of counsel have been, so I think it is harmless. And the picture itself, as a depiction, I think, may be evidence; certainly evidence which you have undertaken to rebut.

Mr. Harris: May I renew my motion limited to striking the masthead of the picture and the sound?

The Court: Any opposition to that?

Mr. Lyon: Well, I think, your Honor, that—I am perfectly willing to have the masthead stricken and I am willing to have the sound track treated merely as an explanation of what is going on as our opinion, the same as an argument of counsel.

The Court: Well, that is the way I have indicated I am going to treat it. [293]

Mr. Lyon: I think it should stay in for that purpose.

Mr. Harris: If we treat the sound track simply as argument of counsel that is, of course, all right. I wouldn't want to have it as evidence in the case.

The Court: The court does not consider it as

evidence. I consider what one can visually see from a view of the picture as evidence.

But the sound track and the masthead are somewhat in the nature of argument.

Mr. Harris: As your Honor probably recalls, on the masthead, for example, it has the names of two gentlemen and their qualifications underneath, which might be prejudicial somehow in the case. That is why I want to strike that masthead, particularly.

Mr. Lyon: That can go out.

The Court: If a judge would be prejudiced by that, that prejudice wouldn't be removed by an order striking it once it has been viewed.

Mr. Harris: Excuse me. Did your Honor rule on my last motion to strike the masthead?

Mr. Lyon: That can go out.

The Court: The masthead goes out. The rest stays in.

Mr. Cox: At your Honor's pleasure, I do have three or four pages of Mr. Stauffer's deposition I would like to read into the record; at a time convenient to the court. [294]

The Court: I want to give you a full working day, but not too much of it.

Now, you have been getting fairly short days because of the pressure of other cases. I don't know how much longer the presentation of your case will require.

Mr. Cox: I think this is the conclusion of it, your Honor, and it shouldn't take over ten minutes to read these excerpts.

The Court: You may proceed now or, if you want to, you can have as much of the day Monday, after a short law and motion calendar, as you desire.

Mr. Lyon: Let's go over to Monday.

Mr. Cox: I am entirely at the pleasure of the court and counsel.

The Court: I should complete the law and motion calendar on Monday by 10:30. Suppose we say 11:00 o'clock?

Mr. Cox: All right. Fine.

The Court: That will give us ample time. We will recess until 11:00 o'clock Monday.

Mr. Lyon: Might I make an inquiry, your Honor?

The Court: Yes.

Mr. Lyon: From a statement you made to the Doctor this morning, it would indicate you intend to have this case submitted on briefs.

The Court: I thought you were going to ask for that. [295]

Mr. Lyon: All I want to know is whether I should be prepared to argue this case Monday afternoon or not. It means a little different work schedule over the week end.

Mr. Harris: I suggest we argue on Monday afternoon and the case be submitted on that argument, or your Honor decide it from the bench, as your Honor sees fit.

The Court: That is the way we like to do these things, because the pertinent art is fresh in our minds if we have the argument currently here.

But it seems to me the style in patent practice is to have a transcript written up and then to brief it and prolong the matter for some six months, by which time the judge has forgotten all about it and has to do a lot of reading.

I will accommodate myself to that procedure if you wish to follow it. It is the standard prevailing practice here.

If you want to argue the case Monday, I will probably decide it Monday, or if not decide it Monday, decide it within a few days thereafter.

Mr. Harris: I suggest the latter procedure, because this is a simple case so far as the issues are concerned.

In a complicated patent case, we would ask to write briefs, but I wouldn't want to in this case.

The Court: The case appears to be a simple one, so far as the court is concerned. You might not get a decision Monday, but I would say that unless some impediment of [296] health arises you will get one before the end of the week.

Mr. Harris: We would like that very much.

Mr. Lyon: I will be prepared to argue Monday afternoon.

The Court: Thank you. Adjourned.

(Whereupon, at 4:12 o'clock p.m., Friday, November 16, 1956, an adjournment was taken to Monday, November 19, 1956, at 11:00 o'clock a.m.) [297]

Monday, November 19, 1956. 11:03 A.M.

The Court: As stated at the close of the session

last week, you can have all day today if you wish. However, we are going to have to adjourn shortly after 12:00 because the judges have some problems they are going to discuss at lunch today and I will have to go to that.

Either finish by 12:00 or we will reconvene at 1:30. I don't mean to rush you. I would just as soon listen to you all afternoon.

Mr. Cox: As stated on Friday afternoon, your Honor, we have about four pages of Mr. Stauffer's deposition I would like to read in the record.

The Court: Yes.

Mr. Cox: I might state that the original deposition is on file with the clerk and I have been advised no corrections were made in the deposition. Is that correct, Mr. Lyon?

Mr. Lyon: Yes.

Mr. Cox: It was filed without correction.

The Clerk: The deposition has not been filed, your Honor.

The Court: I am sorry, I didn't hear you, Mr. Cox.

Mr. Cox: I stated, your Honor, it is my understanding the original deposition had been filed without corrections having been made by the deponent, and Mr. Lyon tells me that [301] is the fact.

The Court: Of course, we don't know unless we compare with whatever copy the deponent made his corrections upon.

Mr. Lyon: There were no corrections.

The Court: Do you mean he didn't want to make any or that they just didn't get made?

Mr. Lyon: We didn't find any we felt it was necessary to make.

I handed this original to the clerk the opening day of trial and asked him to file it. I see he hasn't stamped it filed.

The Court: That is the deposition of Mr. Stauffer, who is present?

Mr. Lyon: Yes.

The Court: Mr. Stauffer, did you look it over?

Mr. Stauffer: I read most of it, your Honor, yes.

The Court: Any corrections you want to make in it?

Mr. Stauffer: No.

The Court: That is your privilege, although Mr. Lyon's privilege and his duty to go over it and bring things to your attention which he might think are incorrect.

You are the witness, so it is up to you whether you feel there is anything that needs to be corrected. If there is, it can be corrected, but we can't take the time right now to have you go over it all. [302]

Mr. Lyon: Mr. Stauffer has been over it, sir, and has signed it.

The Court: All right. It may be filed.

But if, as it is being read, Mr. Stauffer, you note the reporter who took it down misunderstood you and didn't report it correctly, just make a little note of it and give it to Mr. Lyon and immediately after it has been read we will have it corrected.

Mr. Stauffer: Thank you.

Mr. Cox: I will commence reading at page 54. line 1:

“Q. (By Mr. Cox): Do you recognize Defendant’s Exhibit C for identification as the franchise agreement that you granted on or about August 1, 1946 to the parties therein named?”

“A. I would say that was it, yes.

“Q. Was that the standard printed form of the franchise agreement generally in effect between Stauffer System and the licensees at that time?”

Mr. Lyon: If the court please, I think this is an appropriate time for me to state my objection.

As we have pointed out before in the trial of this case, as is evident from Plaintiff’s Exhibit 15, I believe it is,—that is correct—on January 25, 1953, there was executed between the parties to this lawsuit mutual releases.

The Court: Those releases released down to the [303] day of their signature, didn’t they, but they did not release into the future?

Mr. Lyon: That is correct, your Honor. But I wish to point out that Mr. Cox’s question relates to August 1, 1946.

So let us assume that that document that he is referring to in 1946 was illegal, and it, by some odd chance, had some effect against the Slenderella Systems or Mr. Mack, or any of the Slenderella companies, still its effect is totally wiped out by that release of January 1953.

The plaintiff’s position in this case is that anything that occurred prior to January 25, 1953, is wholly immaterial.

The Court: What is the materiality of it, counsel?

Mr. Cox: Very briefly, this, your Honor: The two excerpts from the deposition I propose to read illustrate that during the period of time, certainly from 1946 through 1950 or 1951, the patentee in this action issued franchise or license agreements, which contained both price-fixing provisions and tie-in agreements.

It is our position those constitute misuse of his patent. While I agree with Mr. Lyon, a release in some form was presumably given by the defendant to the plaintiff—in, I think it was, September 1953, Mr. Lyon,—our position very briefly is that we as defendant in this action cannot exonerate or excuse misuse of the patent on the part of the patentee for the simple reason it involves a question of public policy. [304]

A simple release given by the defendant in this case to the plaintiff would not exonerate or excuse if, in fact, there had been misuse of the patent.

Whether or not that misuse continued up to the date of trial, I don't know. I think it will be up to Mr. Lyon to demonstrate it did or didn't.

Mr. Lyon: I think it will not be disputed, I don't believe, that in 1950 and '51 the Stauffer franchising system was revamped, and that since that date there has been no existing franchise agreement that either had price-fixing clauses in it or tie-in clauses.

The Court: If that is so, I suppose you should show it by evidence. What Mr. Cox is apparently doing is undertaking to show a situation which prevailed prior to January 25, 1953, and then bring

into play the presumption that what was once established is presumed to continue.

Mr. Cox: That is correct, your Honor.

The Court: And that is a form of evidence, standing by itself in this present commercial competitive world, that is not awfully strong, but it is a presumption which must be weighed along with the other evidence.

And I think, so far as admissibility is concerned, this evidence is admissible. And it might—I haven't heard it yet—it might bring into play that presumption, that it [305] might be inadequate to do so. We will have to hear it and see if it does bring the presumption into play. Or if there is any feeling on your part that it might do so, Mr. Lyon, we will hear your evidence in rebuttal.

Mr. Cox: Continuing to read from the deposition at page 54, commencing now with line 6:

“Q. Was that the standard printed form of the franchise agreement generally in effect between Stauffer System and the licensees at that time?”

“A. Yes, it was.

“Q. I call your attention to Paragraph 8 of Exhibit C for identification, which reads: ‘The Licensor will furnish the Licensee with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensee agrees at all times to maintain the said written price schedule as furnished by the Licensor.’ Did you have in effect at that time schedules of prices to be charged customers for Stauffer System treatments?”

“A. We had suggested prices but we have never enforced any of them.

“Q. Were these schedules of prices furnished to your franchise holders by you?

“A. I don’t think they were ever furnished, other than in terms of schedules. They were [306] suggested. I think some of the covers bore the price,——”

Mr. Lyon: “* * * some of our covers”.

Mr. Cox: (Continuing reading:)

“I think some of our covers bore the price, but to my knowledge I don’t think we ever had specific schedules of prices.

“Q. Did you ever have any written schedule of prices?

“A. It is possible that we had suggested schedules, yes.

“Q. Were those written schedules delivered or communicated to the franchise holders?

“A. Well, I would say both.

“Q. Do you have those schedules or exemplars of those schedules still in your possession?

“A. It is possible we could pick some up.

“Q. If you find that you have them in your possession, are you prepared to furnish them to us for inspection? “A. That is right.

“Q. Do you recall when you first initiated this program of written schedules of prices?

“A. I think it was 1946.

“Q. You think that is when the practice started?

“A. Yes. [307]

“Q. For how long did that remain in effect?

“A. Oh, about 1950-1951.

“Q. Did those price schedules change during that period of time?

“A. I think they were originally one dollar and they were suggested to two dollars.

“Q. Per treatment?

“A. Per treatment in series.

“Q. Did the price schedules also contain suggested retail prices for the Staufferettes?

“A. We had a retail price on them. However, some of those salons gave them away; some of them charged. There was no standard price.

“Q. The price of Staufferettes was not included in your price schedule, as I understand you?

“A. I don't think so, no.

“Q. Would it be correct to say that according to your present best recollection your price schedule covered only the suggested price of treatments to customers?

“A. My recollection is that that is correct.

“Q. Did these schedules deal with matters other than the cost of this treatment; did they suggest the price for designated courses of treatment?

“A. Yes, I think that the multiple treatments [308] were \$2 and the single treatment was \$3.

“Q. Did the suggested price, for example, of a course of say eighty treatments go out to franchise holders?

“A. I don't think so. I think we only had this one price, \$2 a series and \$3 for individual treatments.”

Resuming the deposition at page 58, line 4:

“Q. Well, when you stated a few moments ago that in about 1951 you ceased the practice of suggesting prices to the franchise holders, do I understand from that, that the prices scheduled in your manual were deleted in 1951?

“A. No, we still had a suggested price schedule but we didn't have any implication in our franchise as to the cost.

“Q. I see, so that in 1951 you changed the form of the franchise to eliminate the requirement that the licensee maintain and adhere to your original price schedule? “A. That is right.”

I will now read from page 13, commencing at line 14:

“Q. And did the Stauffer System, in addition to the tables and the suggested diet, also conduct the sale or dispensation of vitamins in any form?

“A. We have a form of Vitamineral food supplement that was available in areas where it was legal to sell it. That was not necessarily mandatory; it was, you might say, a supporting factor for those salons who could successfully use it.

“Q. I think you called that ‘Vitamineral food supplement’?

“A. No, I think we called it ‘Staufferettes.’

“Q. Are those Staufferettes manufactured by this partnership we have been referring to?

“A. We have it manufactured by a registered laboratory.

“Q. What laboratory; just one laboratory?

“A. S. O. Barnes.

“Q. Are these Staufferettes supplied free of

charge to the franchise holders or do they buy them from you?

“A. They buy them and they sell them.

“Q. They, in turn, sell them to their customers?

“A. That is right.

“Q. Do these Staufferettes include, in addition to vitamins and minerals a bulking compound?

“A. Staufferettes do not, no.

“Q. Do you have any bulking compound which you furnish? [310]

“A. We have an appetite appeaser, called ‘Skimps.’ That has that bulking compound which you refer to.

“Q. How do you spell Skimps?

“A. S-k-i-m-p-s.

“Q. Does the partnership manufacture these Skimps?

“A. They are manufactured by the same laboratory.

“Q. S. O. Barnes? “A. That is right.”

I am terminating the reading at line 20, page 14. Recommencing at page 61, line 7:

“Q. Let me call your attention, Mr. Stauffer, to Paragraph 12 of Defendant’s Exhibit C for identification, which is now in front of you, which is a form of franchise agreement which you had in 1946. That paragraph reads: ‘As a part consideration in granting the Licensee this exclusive franchise, the Licensee agrees to use Stauffer Tables and Stauffer Equipment and Products exclusively, and to purchase, rent, or obtain same solely through the Licensor. Licensee agrees not to sell or deal in

any product or products, or permit the use of any products within any salon established under the terms of this agreement, except such as are [311] manufactured or endorsed by the Licensor.'

"Did Stauffer System, the partnership or the corporation, manufacture any products other than Staufferettes and Skimps and the tables?"

"A. We manufactured a lamp and some of the salons had them and some of them didn't. Other than the tables and the Staufferettes, there wasn't anything else manufactured."

I terminated the reading at page 61, line 24.

Continuing on page 63, line 4:

"Mr. Cox: Q. During this period when this form of agreement was in effect as contained in Paragraph 12, were any Stauffer salons using any of these vitamins, minerals or appetite appeasers other than the Staufferettes or Skimps?"

"A. Not to my knowledge."

That terminates the reading at page 63, line 9.

That is all we propose to read out of the deposition, your Honor.

Mr. Lyon: I think on page 58, just succeeding the part that Mr. Cox read on that page, Mr. Cox asked Mr. Stauffer:

"Q. What was the occasion for your discontinuing that requirement in your franchise agreements in 1951?"

"A. Well, we employed an attorney to draw a new franchise and that was one of the things that we dropped out." [312]

That is all I care to read from the Stauffer deposition.

Mr. Cox: May I ask the clerk to pass me Exhibits 12 and 13 for identification?

Mr. Lyon, referring to Exhibits 12 and 13 for identification, these were furnished by you in the early stages of the trial, pursuant to a subpoena duces tecum served on Mr. Stauffer, were they not?

Mr. Lyon: Yes.

Mr. Cox: May it be stipulated, Mr. Lyon, that Exhibits 12 and 13, respectively, were at one time furnished by Mr. Stauffer to his franchise holders?

Mr. Lyon: Yes.

Mr. Cox: I would like to offer Exhibits 12 and 13 into evidence, if the court please.

Mr. Lyon: I don't see any materiality to Exhibit 13.

The Court: Well, if it is immaterial, I will have to determine that, first, I suppose as a condition to rejecting it, or find an absence of immateriality or presence of materiality to get it in. Otherwise, I will weigh it in submission.

Suppose you hand it to the clerk and I will determine now whether to admit it.

Mr. Cox: I call the court's attention to the last four or five lines on the second page of Exhibit 13, [313] with particular reference to suggested retail sales prices in that exhibit.

Mr. Lyon: It is a question of materiality.

The Court: Are you contending you are right to maintain the first and second counterclaims under the Sherman Act or the Clayton Act?

Mr. Cox: Under Section 4 of the Clayton Act, your Honor.

The Court: Thank you.

Mr. Harris: That is only as to the second counterclaim, your Honor.

The first counterclaim is only for declaratory judgment as to the validity of the infringement to the patent in suit.

The Court: Yes. I thought there was an anti-trust feature in this first counterclaim.

Mr. Harris: No, we are pleading in the defense, as an affirmative defense to the patent action we are pleading patent misuse, and in effect that is in our Answer and——

The Court: Then if that is in the Answer, then you get into the counterclaim and ask for declaratory relief.

Mr. Harris: That is correct, your Honor. The first counterclaim, for declaratory relief, as to validity and infringement of the patent in suit.

In the second counterclaim, it is a counterclaim for damages under Section 4 of the Clayton Act.

The Court: Exhibits 12 and 13 are pertinent [314] evidence as to the counterclaim. They are material evidence as to the counterclaim, and they are received into evidence.

(The documents heretofore marked Plaintiff's Exhibits 12 and 13 were received in evidence.)

Mr. Cox: We have just one other problem, your Honor, in connection with the second counterclaim, and that is the establishment of damages.

Relying on the Kobe case, which is referred to in our pretrial memorandum, the court will remember that particular case, or remember the facts of that case. The damages were found in part to be the cost and expenses and attorney fees of defending the patent infringement action.

We have not adduced any evidence as to our costs of defending this action or our attorney fees.

We would like, with the court's permission, to defer as to damages until the court has ruled upon whether or not there is, in fact, a violation of the antitrust laws.

The Court: You want me to adjudicate the case piecemeal then?

Mr. Cox: No, your Honor. If your Honor finds in favor of the defendant, there will have to be an accounting for damages.

It would seem appropriate at that time, if your Honor should find for the defendant, in connection with the antitrust phase of the action, we will [315] adduce evidence of our expenses of defending the suit.

Mr. Lyon: The court please, I will offer in evidence the defendant's Answers to plaintiff's Interrogatories, in which we asked them what—

The Court: Let's see, have you rested?

Mr. Cox: Subject to the court's ruling on my request for leave to adduce evidence as to the damages at a subsequent date.

The Court: If you get your attorney fees in a patent action, they are handed out by the court, that is, the decision is handed out by the court

upon a showing of some unconscionable situation. They don't follow automatically, even if there has been a violation of the Clayton Act.

They are adjudicated because one party to the litigation has maintained an unconscionable attitude, such as would shock the chancellor's conscience, so he says, "Well, they get attorney fees," one which would intimate they maintained that, but who suffered by it get attorney fees.

As to that, the court looks to the patent law. I don't think there is anything in either the Sherman or Clayton Acts about attorney fees in the attorney fees section.

Of course, you can get attorney fees in a treble damage suit. But in using either of those Acts as a basis for counterclaims here, which is, as you are urging it, primarily an affirmative defense. [316] You are claiming that the patent was misused for the purpose of destroying competition in interstate commerce, and therefore the law will not lend itself to the upholding of the patent even if it otherwise be good.

Isn't that what you are doing?

Mr. Cox: And, your Honor, the law would go even further. As is illustrated in the Kobe Pump case, the law will also permit the defendant filing a cross-complaint for violation of the antitrust laws—if the court finds there has been such a violation, will allow the defendant damages, which damages are measured by the cost of having to defend an unfounded action for infringement of the patent.

Mr. Lyon: May I be heard on that, your Honor?

The Court: Yes, but let me ask Mr. Cox another question.

Is an attempt to violate the Clayton Act sufficient? That is, do they have to actually go so far as to have a restraining effect upon the interstate commerce?

Mr. Cox: I think there rather has to be a restraint on interstate commerce or there has to be a monopoly or an attempt to monopolize.

The Court: You are not conceding that Stauffer has a monopoly over the Slenderella, are you?

Mr. Cox: I am claiming, from the evidence, that prior to the advent of Slenderella in 1954 he [317] constituted essentially the only one in the field and that he did have a monopoly, and it is our position——

The Court: Slenderella got into the field and has prospered in the field, or at least has been active in it. Maybe the price competition was such they couldn't prosper, but they are able to put pretty ambitious television advertising on and they seem to be quite active. You see Slenderella advertised all over and it has a Good Housekeeping seal.

When they did get into the field there certainly was competition. How did the trust hurt you?

Mr. Cox: There is no question about the existence of the competition. Our position is simply Mr. Stauffer, by this very action, is attempting to promote that competition by eliminating Slenderella as a competitor of Stauffer.

The Court: Slenderella is a trade name.

Mr. Cox: That is correct.

The Court: He is objecting here to Slenderella using any of those other structures.

Slenderella could go out and get some Miller devices constructed and put them in its salon, so far as Mr. Stauffer or the Stauffer Systems are concerned, and continue to operate under the name Slenderella.

All he wants the court to do is to restrain the further infringement of a patent and to give him damages for the past infringement. [318]

Mr. Cox: That, I think, is correct.

The Court: How did the trust hurt you? You got going pretty well in spite of it.

Are you saying you are hurt because you had to come in and defend this patent infringement suit?

Mr. Cox: I think if the action were initiated without good cause and without any proper foundation, really believing it, on the part of Mr. Stauffer, that there had been an infringement, I think we are hurt to the extent of our expenses of defending the action.

The Court: Then the court will be required to make a finding as to whether or not Mr. Stauffer is acting with probable cause, shall we say. If it is good cause we don't hold his patent for sure.

But if he has probable cause to believe he has a valid patent and he is not infringing the Clayton Act at the time of the infringement of the patent, can't he come in here even if at one time he did have antitrust violations existing from both ends?

Mr. Cox: I think there is no question but the

courts are open and available to Mr. Stauffer, or any other patentee, for purported infringement.

I believe, on the other hand, Mr. Stauffer is in substantially the same position as was the plaintiff in the Kobe Pump case, where the court found the [319] plaintiff there initiated the patent infringement action without any knowledge or understanding of the alleged infringing machine, the alleged infringing pump.

The Court used that as evidence, in part, at least, of bad faith in bringing the particular patent infringement action.

The Court: Well, we had a case here, one of Mr. Lyon's cases, in which a vacuum cleaner company stole a patent of one of its salesmen, or, *sold* the invention and patented it, and we found that was unconscionable and allowed fees, didn't we, Mr. Lyon?

Mr. Lyon: Yes, sir, as part of the patent infringement action.

Your Honor please, the defendant's theory here is drawn from the Kobe case. In the Kobe case there was an action for patent infringement and a counterclaim for violation of the antitrust laws.

The court found that right from the very beginning there was a conspiracy and combination in restraint of trade. There was a pooling of patents and a monopoly, and that the patent infringement action was brought as part of the conspiracy in restraint of trade.

As such, as one additional element of damage to

the counter-defendant, they allowed his costs of suit.

I think the case stands unique in the law. [320] It is contrary to a case of—controlling, or, at least, one controlling Supreme Court decision. It has never been followed. It is contrary to *Straus v. Victor Talking Machine Company*, 297 Fed. 791, wherein the court said:

“We base our ruling on a stronger ground. The courts must not be closed, litigants must be free to press their claims even though they may lose them.”

And to penalize a patentee for bringing suit by making the costs of suit the damages of an anti-trust action would effectively close the courts to patentees.

Another case, *International Visible Systems Corporation v. Remington-Rand, Inc.*, 65 Fed. (2d) 540, the Sixth Circuit refused any such idea and, of course, as I said, the Supreme Court certainly ruled out any such idea in *Virtue v. Creamery Package Manufacturing Company*, 227 U.S. 8.

To bring it a little closer to home, just last April we tried a case before Judge Carter. It was a patent infringement case, a defense of misuse of the patents and a counterclaim for damages.

The counterclaim for damages was again, like it is here, based entirely on an attempt by the defendants to collect their costs and attorney fees of defending the case.

Judge Carter ordered the counterclaim dismissed for failure of proof of damage. He ruled that the type of thing they were trying to collect here,

[321] assuming they have any right to collect, is not an element of damage in an antitrust case.

That case has not yet been reported because the defendants have been a little bit dilatory in getting in their findings of fact and conclusions of law and suggested judgment.

But it is *Telon, Inc. v. Union Slide Fastener*. It is pending at the present time in this court.

The Court: You are not suggesting that I just get Judge Carter's oral comments about it when I go to lunch today with him?

Mr. Lyon: Well, I don't know how you judges operate.

The Court: We don't operate that way generally. Attorneys seem to think we do and they suggest something that happened in another court, without bringing us a transcript or a copy of the memorandum if it was done by written memorandum.

Of course, in this patent matter, patents are a monopoly, in the first instance. I think the Constitution says that the Congress may enact laws granting monopolies to inventors by issuance of letters patent.

Mr. Lyon: The Congress is empowered to promote the usual arts and sciences by rewarding authors and inventors with a limited monopoly in their inventions, discoveries and writings. That is what we have here. [322]

Have you rested?

Mr. Cox: Could we obtain a ruling from the court on deferring evidence of our attorney fees and expenses of litigation?

The Court: Yes.

Mr. Cox: Thank you. The defendant rests.

The Court: You would have to, in order to maintain successfully an action for relief, under the Clayton Act or the Sherman Act, you would have to show you have been damaged—I don't mean you, the attorneys, but you Slenderella—by the conspirators to maintain the trust, wouldn't you?

We don't issue a punitive damage. The right to generally redress, that is, the public's right to redress the maintenance of a trust is something which is enforced by the Attorney General, is it not?

The private litigant doesn't come in and get a bonus just because he is in the same business as the conspirators in the trust situation.

He comes in and gets damages for his actual out-of-pocket, or for the people who didn't come into his establishment, his actual damage proved upon the basis of any tort damage, where the tort relates to diversion of business.

And then sort of as a penalty we treble those damages. But it arises from damage in the business, not the damage which a person suffers to his purse by having had to defend a lawsuit. [323]

So we will defer the proof of the attorney's fees and the costs of maintaining this action until the court finds that you are entitled to some.

If you are entitled to some, we might hear it on a motion calendar day or it might be referred to a master.

However, in order to maintain upon the counterclaim it would be necessary to show that there was

some damage suffered to the business of Slenderella.

Mr. Cox: I think, your Honor, at this time it probably would be most appropriate for the defendant to withdraw the second counterclaim, without waiving their right to rely upon the patentee's misuse of the patent in suit.

The Court: You withdraw the second counterclaim?

Mr. Cox: Yes.

Mr. Lyon: I accept it.

The Court: You accept it or except to it?

Mr. Lyon: I a-c-c-e-p-t.

The Court: All right. Unless you had more evidence you weren't going to win on it, anyway, Mr. Cox.

Mr. Cox: I felt fairly sure of that, your Honor.

Mr. Lyon: I was going to offer at this time the Answers to the Interrogatories in which I asked them how they were damaged, and they answered, "Defendant claims no damage."

But in view of the withdrawal of the [324] counterclaim, I will skip that.

Will you resume the stand, Mr. Stauffer.

BERNARD H. STAUFFER

the plaintiff herein, recalled as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Lyon): Do you have before you copies of Defendant's Exhibits D-1, -2 and -3, the

(Testimony of Bernard H. Stauffer.)

same being the patents to Miller, Parker and Gunderman? A. I have, yes, sir.

Q. Turning our attention first to the patent to Miller; and an enlargement of the same is handy here, do you find in the Miller patent a device which could be used for giving a Stauffer treatment to a patient?

Mr. Harris: The court please, that is objected to on the ground there is no foundation laid. It is objected to on the ground Mr. Stauffer is neither an engineer, a doctor, nor has he been shown to have any knowledge of patents.

Mr. Lyon: Well, I better lay a foundation.

Q. (By Mr. Lyon): Mr. Stauffer, have you made a careful and detailed study of the Miller patent,— A. Yes, I have.

Q. —No. 1,953,424? [325]

A. Yes, I have.

Q. And particularly the particular view, to compare it to the structure of your own patent in suit, No. 2,240,679? A. Yes, I have.

Q. And have you made a similar study, with a similar view in mind, of the Parker patent, No. 1,978,223, Defendant's Exhibit D-1?

A. Yes, I have.

Q. And have you made a similar study of the Gunderman patent, No. 1,825,588, Exhibit D-3?

A. Yes, I have.

Q. This patent that we have in suit, No. 2,240,-

(Testimony of Bernard H. Stauffer.)

679, is that the only patent you have, Mr. Stauffer? I mean, that has been taken out in your name.

A. No, it is not.

Q. It is one of a series?

A. That is right, yes, sir.

Q. Do you have Canadian patents?

A. Yes.

Q. Do you have British patents?

A. Yes, I have.

Q. Since August of 1938, when you filed the application for your present patent in suit, what has been your experience with respect to the studying and reading and evaluating of the patents in [326] general, particularly in the therapeutic apparatus field?

A. Well, we have had a constant experience with millions of people coming through our salons in relation to the patents that we have.

We have naturally extended our investigation into other motions, as it is related to the possible use in the Stauffer System.

Q. During this period of time, have you had occasion to study a number of patents?

A. Yes, we are constantly studying patents in our business.

Q. Who in the Stauffer System has held the primary responsibility with respect to the patent policy of the company?

A. Well, I have held that position.

Q. All right. Now, calling your attention to the

(Testimony of Bernard H. Stauffer.)

Miller patent, No. 1,953,424, I ask you again whether there is any mechanism disclosed in that patent which could be used to give a Stauffer System treatment to a patient.

Mr. Harris: The court please, the same objection on the same ground.

The Court: Overruled.

The Witness: You want me to explain the action of the Miller table in relation to the action of the Home Plan—or the—— [327]

Q. (By Mr. Lyon): We will do that next.

Could you use the Miller table to give a person a Stauffer treatment?

A. Not a Stauffer treatment, no.

Q. Now, will you explain what the Miller patent does show?

A. The Miller patent primarily, in comparing it with the action of our No. 1 table, has a motion coming up against the body as it is strapped onto the platform or the couch. And the possibility of any motion back and forth in relation to the couch is automatically absorbed in this—(indicating)——

Q. Indicating the pivot point 32?

A. Pivot point 32. As this thing comes up, if it could come this way (indicating), it automatically must compensate by the absorption of the motion in this pivot point 32 (indicating), so you have eliminated—you have only an upward thrust and not the back and forth motion that is absolutely

(Testimony of Bernard H. Stauffer.)

essential to get the required results that the Stauffer table gets.

Mr. Harris: May I have my objection, the court please, to any and all testimony by Mr. Stauffer as to these three prior art patents, and any comparison of those patents with the issues in this case? I don't want to keep restating the objection.

The Court: I understand that you contend he is not qualified and I shouldn't be listening to him.

Mr. Harris: Yes, your Honor.

The Court: The court holds he is qualified and overrules the objection to the line of testimony.

Q. (By Mr. Lyon): Do you find in the Miller patent itself—and I mean in that printed specification—any description of the motion of the pad 27?

A. The back pad 27 is adjusted longitudinally by sliding it up or down at the hinged arm 33, and the vertical adjustment is made by means of the slotted link 44, and produces an upward pressing against the spine.

On line 25, page 3, it says:

“The chest and the back pads 28 and 27 respectively operate in unison, that is, as the chest straps are pulled downwardly to contact the chest, the back pad 27 simultaneously presses upwardly against the spine.”

Q. Now, with that particular description in mind, would you say that the Miller patent has an applicator which oscillates axially of the length of the couch?

A. It definitely does not operate axially, no.

(Testimony of Bernard H. Stauffer.)

Q. As a matter of fact, this Miller patent is a sort of an artificial respiration system, isn't it? The straps across the chest and the abdomen are pulling down, while the applicator is pushing up, is that correct? [329]

A. It would induce that type of effect to the lung area.

Q. Now, turning your attention to Exhibit D-3—

The Court: Before you get to that, what do you mean by oscillatable?

The Witness: Oscillatable in my determination is back and forth, longitudinally, with the top of the table. In other words, this motion (indicating), by virtue of the mechanism, as it is applied to this point, is forced to push upward and there is a slight possibility of it moving longitudinally, but it is absorbed by this thing here (indicating), which, when the weight comes down on that, there cannot be any motion here (indicating), because this thing is capable of being hinged this way and continues upward, rather than back and forth (indicating). There is no back and forth motion here whatsoever (indicating). This absorbs all that motion (indicating), when you put that hinge in there and this action forces it right straight up against the straps, and that is what you have (indicating). You have a motion here that is going right straight up and not back and forth with a tilting action, like our patent does (indicating).

In other words, the motion is not capable of giv-

(Testimony of Bernard H. Stauffer.)

ing a Stauffer treatment that gives postural alignment and gives an entirely different motion to the body. It is in a sense a wave motion—or, rather, a pushing motion, rather than a [330] wave motion that is applied to the body.

The Court: Your machine has the wave motion?

The Witness: Ours induces the wave motion because of its single action, yes, sir.

Q. (By Mr. Lyon): Will you turn your attention now to the Gunderman patent, No. 1,825,588, Defendant's Exhibit D-3?

A. (Witness complies.)

Q. In the first place, it is quite obvious, is it not, that this device does not contain a couch (indicating)?

A. No, it does not.

Q. Is a couch an important part of your device, your patent?

A. It is very important because it allows that part of the body that is not on the movable platform to act as an anchor, in which the motion of the platform stretches the muscular tissue between the anchored part and the movable part, thus giving traction (indicating).

Q. Do you care to draw a distinction between what you just described for the judge, that is, oscillation and vibration?

A. I have had that discussion for quite a while, and we have done our best to identify it. We have done some work with U.C.L.A. in that respect. To the best of our knowledge, we terminate—or, rather, we identify vibration as motion that is fast enough

(Testimony of Bernard H. Stauffer.)

to induce a counter-restriction against or a [331] tension of the vibration.

But when the motion becomes below the moment of that tension—not to induce any striction—constriction in the nervous system or in the muscular areas, then it is considered oscillation.

The Court: Do you have to have a subject to which the device is applied in order to get vibration?

I have always understood vibration can exist in a device itself. From this answer, it would seem that you have to have a nervous system for it to work on or a muscular system, or something of the kind.

Mr. Lyon: I think I can clarify that.

The Court: It is an ordinary term of physics, isn't it?

Mr. Lyon: That is right. That is right, your Honor. I think the witness had in mind—and I will bring it out——

Q. (By Mr. Lyon): That in this particular art, that is, the passive exercise body treatment art, that is where you draw this distinction, is it not, between vibration and oscillation?

A. Oh, yes, sir.

Q. That is what you had in mind?

A. Oh, yes, it is. That is what we are doing here.

Q. What is the Gunderman patent? What does it describe?

A. Well, it describes a vibrating machine, so

(Testimony of Bernard H. Stauffer.)

identifies it, as a portable vibrating machine. [332]

Q. Is it fair to state in the therapeutic treatment of the human body vibration and oscillation are two entirely separate, different things?

A. It definitely is, yes.

Q. They don't perform the same function, is that correct?

A. One might produce an adverse condition. In other words, vibration, you don't need to be a doctor to know that the body is antagonistic towards vibration in most instances.

While, if the motion is, let us say, compatible and the motion applied to the body that does not induce that tension, it might be considered and we consider it as oscillation.

Q. Referring again to the Gunderman patent, is there any device in there, indicated in that patent, even adding a couch to it, which could be used to give a Stauffer treatment to a patient?

A. The only one that has any similarity is that part which they have identified as a foot vibrator, but the arc in which it travels is corresponding to the motion of the—rather, the arc is identical with the hinge at the bottom, permitting it to go through a certain segment of circle there (indicating).

In so doing, you lose the lifting effect that is in the Stauffer motion. The platform lifts at the same time it goes back and forth. [333]

Q. That is what you mean by tiltingly oscillate, is that right?

A. Tiltingly oscillating. By permitting the top of

(Testimony of Bernard H. Stauffer.)

that to be rounded you miss the lifting effect entirely, and without that lifting effect you do not induce that motion into the anatomy, so essential to a Stauffer treatment.

In fact, it has been one of the most important parts of the success of the Stauffer table, the fact that it does induce that lifting action when applied to the pelvis. It gives the alignment or the postural effect that we have accomplished over these 20 years.

Q. And it is an important factor in obtaining that, that the applicator in a Stauffer patent is flat rather than curved, is it not?

A. Very much. Otherwise, you would never get the tilting action. It goes through the same plane all the time.

Q. Now, turn your attention to the Parker patent, No. 1,978,223, Defendant's D-1. I first ask you, could this mechanism—you don't have one?

A. Yes, I have.

The Court: There is a pretty good drawing of it there in the larger exhibit, if you want to put it up where he can see it. At least, it seems to accurately reproduce the drawings in the small soft copy. [334]

Mr. Lyon: We don't question that these are photostatic reproductions of the drawings.

The Court: All right.

Q. (By Mr. Lyon): I will first ask you if that device could be used to give a Stauffer treatment to a patient. A. No, it could not.

(Testimony of Bernard H. Stauffer.)

Q. Why?

A. On the weight of the body, as it is described in this illustration, the weight of the body would fall on these units that are illustrated here (indicating), and in order to make the proper alignment effect that the Stauffer table has, it must be done in unison at a section of the body; particularly the pelvis, where the motion is telegraphed all over the body in one motion.

As this is applied here (indicating), these units carry the weight of the body and act somewhat against one another. As this thing goes back and forth (indicating) you have a localized effect. Not a motion that is applied through the skeletal structure, but, rather, have a localized effect in each segment that touches the body. It is multiple, and you have carried the weight of the body over the entire top half of the body, rather than localized it in one spot.

You can't get the tilting action out of this because it hasn't the one platform that does—sends this one wave motion that induces the proper [335] alignment. You can't get it out of that design, by virtue of the fact it is multiple and it is localized to the pads at the position that they touch the body in their respective places.

Q. Mr. Stauffer,—

The Court: How much longer do you expect this will be? Are you just taking him through the cited art?

(Testimony of Bernard H. Stauffer.)

Mr. Lyon: I would like about another ten minutes with this witness.

The Court: You may certainly have it. But it would be much easier for us to reconvene at 1:30 than to continue on now, so we will take the recess until 1:30.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 o'clock p.m. of the same day.) [336]

Monday, November 19, 1956—1:30 p.m.

The Court: Are you ready to proceed?

Mr. Lyon: Yes.

Mr. Harris: Yes, your Honor.

The Court: We will resume with the testimony.

BERNARD H. STAUFFER

the plaintiff herein, called as a witness on behalf of himself, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Lyon): Mr. Stauffer, I show you Plaintiff's Exhibit 16,—first, I will ask you, did you hear the testimony of Dr. Knapp?

A. Yes, I did.

Q. He pointed out that in the Slenderella table, as exemplified by Plaintiff's 16, there were two arms which he marked 11 and 11-A, and he pointed out that in one cycle of the use of this machine those were locked together by clutches, so that they reciprocated in unison, that is, they were both in the same phase.

(Testimony of Bernard H. Stauffer.)

However, I do note there are two of them, and I call your attention to the fact that in your patent there is a single, what we have heretofore called applicators. [337]

I would like to have you compare the action of the Slenderella table, when it is in the phase which I have given you, where the two arms are operating in unison, with the action of your patent.

Mr. Harris: The court please, that is objected to as incompetent and irrelevant. Mr. Stauffer has admitted he never saw one of these Slenderella machines.

The Court: What about it, counsel?

Mr. Lyon: I submit he can read a drawing and he knows how they operate. He is quite an authority on these motions.

The Court: Overruled.

The Witness: If this 11 and 11-A were locked together and moving in unison, it would give the identical effect as it would in the Stauffer No. 1 table.

Q. (By Mr. Lyon): It would accomplish that same function, is that correct?

A. It would be identical in motion. It would accomplish the same thing and would virtually be the same thing.

Q. Now, in this Exhibit 16 we have some mechanism over here on the left-hand side of the table (indicating), which is designed to shake the whole table.

(Testimony of Bernard H. Stauffer.)

Do you employ any such mechanism in the Stauffer System?

A. Well, the Stauffer System since its inception has had what we term this No. 1 table, which is one platform in motion. [338]

And we have a No. 2 table, which are these two alternating, and we have a No. 3, which the entire top of the bed gives a faster and stimulating motion, which construction is very similar and, as explained to me, very similar to the one that is illustrated here (indicating).

Q. Would it be fair to say that the drawing which you have before you, Exhibit 16, incorporates the basic principles of three different Stauffer tables?

A. Yes, it does, it definitely does.

Q. And only one of them is the one you assert your patent covers?

A. That is right, only the No. 1 is all.

Q. Now, Mr. Stauffer, in 1950 you were in litigation in this court with one of your previous franchise holders, were you not?

A. Well,—

Q. Mrs. Exley? A. Mrs. Exley, yes, I was.

Q. And did anything happen in the trial of that case that would cause you to re-examine your franchise structure?

Mr. Harris: The court please, the question gives a false implication. That case was never tried. The case never went to trial. I say that for counsel's information.

(Testimony of Bernard H. Stauffer.)

The Court: The question doesn't suggest it did.

Mr. Lyon: I am sorry,— [339]

The Court: "Did anything happen in that case?"

A lot of things happen in a case. They start happening when you hand the complaint to the clerk and he reaches in the drawer to see what judge draws it, and then puts a stamp on it.

Mr. Harris: I am sure Mr. Lyon misspoke himself.

Mr. Lyon: I will rephrase the question.

Q. (By Mr. Lyon): Did anything happen during the pendency of that case, Stauffer v. Exley, which caused you to re-examine your franchise system? That can be answered yes or no.

A. Yes, there was something that happened.

Q. What happened?

A. Well, I had a general counsel who employed Mr. Ford Harris in relation to the registered trade name that was being violated, and, of course, the Clayton Act was quite a subject in this—

Q. Let me shorten the whole thing. As a matter of fact, Mrs. Exley filed an answer in the case, did she not? A. Yes, she did.

Q. And the answer raised the question of whether or not your franchise system violated the antitrust laws, did it not?

A. That is correct.

Q. You were advised at that time it would be well to have counsel examine your franchise system, is that correct? [340]

A. Yes, Mr. Harris advised me to have some

(Testimony of Bernard H. Stauffer.)

of those corrections made, which I of course took immediate steps to do so, through my general counsel.

Q. I hand you Exhibits I and J to your deposition, and ask you if these are representative of your franchise agreements as of post-1950 or '51, when you re-examined your franchise agreements.

A. This was the one that was after 1950, that is correct (indicating).

Q. Those two agreements?

A. That is right.

Mr. Lyon: These two agreements are offered as Plaintiff's Exhibits next in order.

The Court: What is the foundation for them? You simply said they were exhibits to a deposition.

Q. (By Mr. Lyon): These are, are they not, Mr. Stauffer, exemplars of the current uniform agreement which you offered to franchise holders, is that correct?

Mr. Cox: We may be able to shorten this whole examination, because we are prepared to stipulate that in or about 1950 or 1951 the former franchise agreement employed by Mr. Stauffer was revised to eliminate the so-called price-fixing clause, Clause 8, and to eliminate the tie-in agreement clause, Clause 12.

Exemplars are already part of the file in this [341] case in responses to request for admissions which have been filed, which I assume your Honor considers as part of the entire file in the case, just as admissions to the answer.

(Testimony of Bernard H. Stauffer.)

Mr. Lyon: I am not exactly sure myself, Mr. Cox. That is why, out of an extra-abundance of caution, I would like to have these in the record.

I think the answers to request for admissions are more or less like an interrogatory; it is not in unless it is put in evidence.

The Court: Are you willing to accept his stipulation?

Mr. Lyon: I am accepting his stipulation.

The Court: Then you may put these in evidence, too.

Mr. Cox: Mr. Lyon, may we stipulate the request for admissions and responses thereto may be considered as evidence in the case?

Mr. Lyon: So stipulated.

The first one?

The Clerk: Plaintiff's Exhibit 20 for identification.

Mr. Lyon: The second one will be 21.

(The documents referred to were marked Plaintiff's Exhibits 20 and 21 for identification.)

The Court: Is there anything besides the tie-in agreement and the price-fixing agreement which you contend amounted to a violation of either the Clayton or the Sherman Acts?

Mr. Cox: There is a clause, your Honor, that is [342] also present in the current form of franchise agreement which probably violates Section 16600 of the Business and Professions Code of the State of California.

(Testimony of Bernard H. Stauffer.)

We do not take the position, however, that constitutes a more recent violation, for the purpose of application of the Sherman Act.

Q. (By Mr. Lyon): Mr. Stauffer, during the period of time when your franchise agreements contained a stipulation that the salon would maintain prices, did you ever take any active steps to enforce that provision of the contract?

A. No, we never took any active steps to enforce it. In fact, I am reasonably sure that every salon in the country had their own price. They may have had the \$2.00 price in a general manner, but each one gave a different discount for various reasons, which of course changed the price to the individual very often at the time they were making the sale, as to whether they could successfully make the sale or not.

Q. Mr. Mack was one of the persons that was licensed under your Stauffer System.

Did you have any particular discussion with Mr. Mack—and by “Mack” I mean the president of the defendant corporation here—concerning the maintenance of prices?

A. I think the only discussion we had was whether the price that they were charging—which I am sure wasn't strictly adhered to as far as the price [343] that we suggested—was whether it would be profitable for them, and I, after all, had an obligation of making these franchise holders successful.

We received no additional money if they charged

(Testimony of Bernard H. Stauffer.)

more or if they charged less. Our fees at that time were fixed. It was a fixed rental.

The only obligation we had to this individual was to see that they were successful. It was on that point that we based our whole conclusion.

Q. Now, at one time prior to 1950 or '51, when these contracts were revised, your contracts contained a clause in which the salon owner agreed not to use any equipment other than Stauffer's or Stauffer-authorized equipment.

Did you ever take any active steps to prevent the use in the salons of unauthorized equipment?

A. No, we never have.

Q. Were there any of the old type franchises which contained any of these provisions as to price fixing or as to the use of competing materials, machinery, in existence as, say, of January, 1952?

A. Would you state that again?

Mr. Lyon: Will you read it?

(The question was read.)

The Witness: I think they were practically all converted over by that time. I am just making that [344] guess, however; I am not positive.

But during that period of time they were in the transition stage and I would think they were mostly made over.

Mr. Lyon: You may cross examine.

Mr. Harris: No cross examination, the court please.

The Court: Thank you, sir.

(Witness excused.)

Mr. Lyon: The plaintiff rests.

Mr. Harris: Defendant rests.

The Court: Are you ready to argue your case?

Mr. Harris: Yes, your Honor.

The Court: All right.

Are you ready, Mr. Lyon?

Mr. Lyon: Yes. Shall I proceed?

The Court: Surely.

Mr. Lyon: As I stated in the opening part of the trial, this case has now been restricted to a charge of infringement of Claim 1 of the patent in suit.

Claim 1 is not restricted as to any degree of arc. It appears to me clearly and obviously infringed by the Slenderella tables.

The Slenderella table is a muscle-relaxing machine and it embodies a couch for the repose of the human body and it has a slotway in the top surface, through which a vertically directed and oscillatable support extends. It has, in fact, [345] a slotway through which two vertically directed and oscillatable supports extend.

There may be an argument based upon the fact that the claim states that the support is for a simple, flat, rectangular means. Mr. Stauffer has just stated—and I think it is clear beyond argument—that the two applicators of the Slenderella structure perform the same function and they do so in the same manner as the single applicator of the patent, or the claim, while they are locked together by the dog clutch, so as to operate in unison.

I do not have the authority with me here, but

ample authority can be cited to the effect that a device which is an infringement part of the time, and part of the time only, is nevertheless infringement. So that the mere fact that this device is convertible on one cycle to a device in which there are two supports moving in opposite directions does not free it from being an infringement.

Now, we think that we have here a duplication in two separate ways. It is elementary patent law that you cannot escape infringement where a patent calls for or shows a single element, by dividing that element into a plurality of elements which still perform the same function.

Walker on Patents, Diller's Edition, Section 462, collects and lists a long list of cases on the question of multiplication or duplication of parts. [346]

I have selected one or two who have very apt language to quote to the court. In the case of *Sutherland Paper Co. v. Auburn Carton Corporation*, 118 Fed. (2d) 862, at 864, the claim called for a carton comprising a blank cut and scored, and then it went on as to how it was folded and so on. It was an egg crate.

A blank is a single one-piece unit. The defendant took two pieces of paper and glued them together. The Court of Appeals inquired:

“Did the defendants avoid infringement by using two pieces of paper and gluing them together and thereby making one piece? For the purpose of determining infringement, defendants' two pieces, glued together, were one piece. Infringement was

not avoided by using two pieces and gluing them together.”

I submit that is what the defendant has done here. They have put two pads side by side and they have connected them by mechanical means, such as clutches, so they work together and perform the same function as the single applicator of the patent in suit, and they do so in the same way.

When locked together and forming a unitarian structure, these pads or applicators move as a unit, and it is apt to say of them, as is said in Claim 1 in the patent in suit, that they tiltingly move and they oscillate,

“* * * axially of the length of said couch-like [347] structure whereby zonular areas of the body may be massaged by mechanical manipulation in a substantially horizontal plane.”

Infringement is thus clearly made up.

On the point of duplication of parts, I would like to cite a few more cases. *Samson-United v. Sears, Roebuck & Co.*, 103 Fed. (2d) 312, where it states:

“It is no departure from the patent to use a blank of blades instead of single blades or two-piece hub instead of a single-piece hub to accomplish the same result.”

Quoting from page 315.

I would like to cite the next case. It probably paid for my college education. *Stebler vs. Riverside Heights Orange Growers' Ass'n.*, 205 Fed. 735; one of my father's cases. It is leading in the Circuit.

That the adding of an additional function to a machine, if it would perform the function of the

patent in suit, it is immaterial that it will also do something else.

That is applicable here to the accused structure, when you reverse the electric motor and you get our No. 2 table, which is unpatented, instead of our No. 1 table, which is patented.

Mr. Harris will probably be heard to state that a single flat applicator of the patent in suit is a [348] limitation which cannot be overlooked because it was placed in the claim to overcome a rejection on Parker.

I believe that even if we accept that it is an important limitation. Its meaning is clear. It is still entitled to a range of equivalents.

What we were distinguishing from in Parker, when we put in a single applicator, was a series of applicators, one after the other.

The defendant does have a series of applicators, one after the other, which, as Mr. Stauffer testified, would be working against each other. But they do have a unitary structure, which is the full equivalent of the single applicator of the patent in suit. Mr. Harris may argue that some of the language of Claim 2 is in some manner or other imparted into Claim 1. And he will read from the specification of the patent—

The Court: I understood that neither of you were making any point about Claim 2.

Mr. Lyon: I believe that Mr. Harris will argue that language in Claim 1, in effect, means the same thing as Claim 2.

The Court: Are you going to contend that Claim 2 is involved in this litigation?

Mr. Harris: No. The plaintiff has disclaimed any infringement of Claim 2, and we are content with that. [349]

I will expect the court to make a finding, however, that Claim 2, in any event, is not infringed, in view of counsel's withdrawal of that claim.

Mr. Lyon: I will be very brief in that regard. It is very elementary patent law that where a limitation is in one claim, clearly set forth in one claim, and that limitation does not appear in another claim, a court will not impart the limitation into the other claim. It will read the claims as separately written and as covering entirely different scopes.

As the Supreme Court said, or, rather, as our Ninth Circuit Court has just quoted in the Winslow Engineering Company v. Smith case, 228 Fed. (2d) 332, decided December 14th of last year, and it quoted from Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, concerning this question of not reading elements from one claim into another claim. The Supreme Court said:

“It would accomplish little to require that claims be separately written if they are not separately read.”

So much on the question of infringement. I will not belabor it because I believe it is clear.

There is always present in a patent infringement case a question of invention. Nobody has ever been able to define “invention”. Congress tried to define

[350] it in a negative sort of way when they codified the law, but almost everybody agrees they haven't changed the law, except perhaps to negative any idea that an invention requires a flash of genius.

What do we do when we try to decide whether a device was obvious to a man skilled in the art or whether it was an invention? We see what it has done.

Since 1938, when Mr. Stauffer started out, Stauffer tables, embodying the invention of the patent in suit, were licensed all over the United States and in foreign countries. Mr. Stauffer has stated that over five million women have been treated by the invention of the patent in suit. The defendant has paid the compliment of imitation.

In *Landis v. Schick Dry Shaver* the Court of Appeals stated:

"Imitation has often been taken especially in this court as evidence of what the world should think of the invention and as conclusive evidence of what the defendant thinks of it."

This remarkable success, in a world teeming with competitors for the woman-figure dollar, is remarkable. There are all sorts of competing devices. Mr. Stauffer mentioned the Relaxacizor, and anybody who owns a television machine can't get very far from Vic Tanny and his gyms, which are not new things. [351]

Yet this patent, this system, this patent created a new system of treating the human body, which has been of great service to thousands and millions

of women and even some men. The home unit, such as we have in evidence here, is now being sold to the public. The Stauffer treatment—

The Court: I didn't get that. The home unit is what?

Mr. Lyon: Is now being sold to the public for use in offices and homes.

I think it is fair to say that the patent in suit created two great businesses, Mr. Stauffer's business and Mr. Lawrence Mack's Slenderella System.

The prior patents that are relied upon by the defendant here, the Parker patent was before the Patent Office, and you might say it was rejected by the Patent Office as not anticipating the claims in suit, because they allowed the claim we are standing on over the Parker patent.

We can see why. It does not embody the essential of the Stauffer movement. It has, as we say, applicators that are working against each other.

The Miller patent merely pokes a man in the back. It does not have an applicator adapted to tiltingly move axially of the couch.

Any tendency to have any such tiltingly movement of the applicator is effectively removed by the articulation at the pivot point 32. [352]

The remaining patent to Gunderman is a vibrating machine and could not be used to carry out the Stauffer treatment. It doesn't have a couch, so it couldn't possibly have a slotway formed in a couch. It couldn't possibly have an applicator moving axially of a couch. So it does not meet the claim of the patent in suit.

It would not teach anything in this art, either, as there is a profound difference between a vibrator which, as shown from the Miller patent, vibrates at 1,700 R.P.M., and what the plaintiff and the defendant are doing here, which is in the neighborhood of 130 to 150 R.P.M.

I notice the court paying particular attention, and at the risk of being repetitious, if you have a force resting downwardly, a weight resting downwardly upon this applicator 27 (indicating), which, incidentally, is described in the patent as being pivoted about 32, so it can adjust itself to the back of a patient, so when a person puts his back on that thing, that would tilt up until it adjusted to the back, and then when you start swinging this arm in this direction (indicating), and there was a component of motion in that direction (indicating), it would simply mean the other one would fold back, in order that the pad could remain in firm contact with the back of the patient.

The over-all resultant would be, as the patent itself states, an upward push, which is certainly [353] foreign to the Stauffer invention and the claim which we are standing on.

I believe that will conclude my opening remarks.

Mr. Harris: May it please the court, my primary function, as I understand it, in making a closing argument, is to be helpful to the court. I am prepared to argue this case at great length and go into all the details of the evidence. I don't want to labor or belabor any of the points that your Honor may not think are helpful. So I suggest if

I do argue something that your Honor is satisfied on, that your Honor will stop me.

First, if the court please, infringement, patent infringement is not a mere matter of words. We don't just read a patent claim and then see whether it reads on its face on a defendant's accused structure. We must take the claim in the light of the specifications and drawings, in the light of file wrapper history claim, in the light of the prior art. And it is the plaintiff's burden, in any patent infringement case, on the issue of infringement to prove three things.

First, that the defendant's accused structure has the same elements set forth in the claim in suit.

Secondly, that those elements operate in substantially the same way as the elements of the claim of the patent in suit.

And, thirdly, that the defendant's machine achieves the same or substantially the same result [354] as the machine of the patent in suit.

In this case we are concerned only with the Stauffer patent and the question as to whether it is infringed by the defendant's machine. Counsel has tried this case on a comparison of plaintiff's machine with that the machine of the defendant. But we suggest it is wholly immaterial what the plaintiff's machine is.

What we are concerned with is the machine shown and described in the patent in suit, and the comparison of that machine with the defendant's machine.

I wish to consider those three elements of in-

fringement separately. First, whether the defendant's machine has the same elements as set forth in Claim 1 of the patent in suit.

Secondly, whether the elements in the defendant's machine operate in substantially the same manner as that of the patent in suit.

And, thirdly, whether the elements of the defendant's machine achieve the same result.

We suggest, of course, first, that the defendant's machine does not have the elements of Claim 1 of the patent in suit, even if we take those elements at their face value in the claim.

First, Claim 1 specifies a single applicator in line 6 of Claim 1. The defendant's machine, as the evidence shows, has double applicators side by side.

That word "single" in Claim 1 is very important because, as that claim was originally submitted to the Patent Office as Claim 10 of the Stauffer application for a patent, and it appears on page 24 of the file wrapper of the patent in suit, and as originally submitted, it was submitted without the words "single applicator" in the claim.

Claim 10 of the application was then rejected by the Patent Office on this Parker patent we are speaking of, which has double applicators.

The Court: More than double, isn't it?

Mr. Harris: Yes.

The Court: Multiple.

Mr. Harris: It shows six applicators, each one of which is double. If we consider any single applicator, it is a double applicator as is the defendant's construction.

That appears a little more clearly in Figure 4 of the drawings of the Parker patent. Taking an end view of one of these applicators, it is very plain that Parker shows in each applicator—well, each set of applicators is double. It has two applicators, one on each side of the center line. Those applicators move together, just as do the defendant's applicators.

So in response to the rejection by the Patent Office of Claim 10 of the Stauffer application on this Parker patent, the applicant, Mr. Stauffer, [356] through his attorneys, amended Claim 1 of the Stauffer patent application to insert the word "single" before "applicator" in Claim 1. That appears at page 24 of the file wrapper.

It wasn't until they did that—so amended Claim 1 to insert the word "single"—that the claim was allowed.

Thus the words "single applicator" are very material and it was by so amending the claim that Mr. Stauffer laid the foundation for its allowance.

The word "flat" in Claim 1, it says, "flat applicator"—"flat rectangular applicator". That word is very important.

The applicator 18 of the Stauffer patent in suit is flat. As distinguishing from the Parker patent, in which the applicators are rounded on the top, the Stauffer patent shows the flat applicator 18.

The importance of that was brought out very well this morning by Mr. Stauffer's testimony, where he was distinguishing his patent construction from the Gunderman patent. In the Gunder-

man patent, if your Honor will recall, the applicator is a curved plate 26.

Mr. Stauffer pointed out that by using a curved plate you do not get the uplift or lifting-up motion that is required to attain the results contended for by the Stauffer patent in suit.

Whereas, with his applicator he gets the lifting, [357] so we suggest, if the court please, that the word "flat" in the claim is also a material limitation, and since the defendant's applicators are rounded, quite similar to the Gunderman patent, we get the same result as Gunderman. Either we don't infringe or the patent in suit is invalid.

But, in any event, we do not have a flat applicator. Our applicators are rounded. It shows very clearly in Defendant's Exhibit C, in which the applicators are quite rounded, very similar to the Gunderman patent.

So we suggest that the defendant does not infringe by the omission of the element "a flat applicator". Defendant does not use a single applicator.

On either of those two grounds we say, if the court please, that the defendant's machines do not infringe this patent in suit.

Now, the next important words in Claim 1 are these words "tiltingly move". There has been a lot of evidence on that, the meaning of those words.

Again, the word "tiltingly" was not in Claim 1 when it was originally submitted to the Patent Office, as appears on page 24 of the file wrapper. The claim was rejected on Parker, the Parker patent, and in response to that rejection Mr. Stauffer's

counsel amended Claim 1—then Claim 10 of the application—to add the word “tiltingly” to distinguish from a type of motion found in Parker, in [358] which the applicators move through an arc on both sides of the vertical, just as they do in the defendant’s machines.

Dr. Knapp pointed out that to him the word “tiltingly” means and can only mean a movement in which the applicator support 20 in the Stauffer patent is at all times tilted with respect to the vertical. And he adverted to several places in the specification of the patent where that is described.

That was the word that was added in response to the rejection on Parker and as a material limitation. Since the defendant’s tables do not move in that way, that jerky movement on one side of the vertical, we suggest, if the court please, that they do not infringe.

As your Honor will recollect, in the original application for the Stauffer patent the drawings originally, as shown in the file wrapper, the original drawings, the enlargement of which is on the easel on the board here, in the original drawings submitted to the Patent Office the applicator was shown to move on both sides of the vertical, by the dotted lines in Figure 2 of the application drawing.

Claims were submitted to the Patent Office in the original application, Claims 2, 3, 4, 5 and 6, which appear at pages 9 to 11 of the file wrapper. Those claims were all limited to a machine having

“* * * body contacting member extending through [359] the top surface of said couch and extending

in a plane horizontal with the top surface thereof, * * * ”

In other words, those claims originally submitted in the Stauffer application were expressly limited to an applicator, which in one position was horizontal, just as is shown in the original drawing of the Stauffer application.

Those claims would have read directly upon the defendant's machine. Those claims were rejected on the Parker patent and on other prior art, and it was then that Mr. Stauffer's attorney amended his patent application to strike out the original drawing and to substitute the drawing which appears in the patent as issued, to add to the specification of his patent all this detailed material which describes the movement as being limited to one side of the vertical.

It was in response to that rejection that those amendments were made to the specification and to the claims.

In that connection, to illustrate how far this went, Claim 5 of the original application, from which I have just read, the statement that the
“* * * oscillatable member extending through the top surface of said couch and extending in a plane horizontal therewith, * * * ”

means the very thing shown in the original Stauffer drawing. The very thing described in the original application.

Then, as I said, that claim was rejected on the [360] prior art and then Mr. Stauffer's attorney amended that claim to change the claim to say:

“* * * an oscillatable member extending through the top surface of said couch and extending in a plane constantly inclined from the horizontal. * * *”

In other words, he changed it from a plane parallel to the top of the couch to a plane constantly inclined with respect to the top of the couch. That claim was subsequently rejected and finally abandoned.

At any rate, that word “tiltingly”, we suggest, in Claim 1 is an extremely important word and by its insertion and by the amendments of the specification and the drawings Mr. Stauffer is now estopped to contend for any interpretation of Claim 1. It covers exactly the thing that he originally claimed, he originally showed in his application, and then canceled out in response to the rejection of the Patent Office, which we say is an abandonment and a dedication of that particular matter to the public.

We suggest that Mr. Stauffer, having so limited his application and his claims and his specifications, cannot now ask this court to expand his claim to cover that which was originally shown and described in the claim and then canceled.

So we suggest, if the court please, that the defendant's machines are not infringed because they [361] do not have the same elements set forth clearly in Claim 1. They do not have a single applicator, they do not have a flat applicator, and, lastly, the applicators do not tiltingly move on one side of the vertical, but move through the same arc of

movement as in the Parker patent and in the Gunderman, and, therefore, there is no infringement.

I might also say that Claim 1, in addition, contains a further important word, and that is the word "axially". It says:

"* * * and means to oscillate said applicator axially of the length of said couch * * *"

The evidence shows there are two applicators in the defendant's machines which operate separately on each side of the center line of the couch. They do not operate on the center line, which is the axis of the couch. Whereas, in the Stauffer patent there is a single applicator on the center line of the couch.

For that reason we say the defendant's machines do not have the elements, the clear elements set forth in the claims.

If we construe these words, "single", "flat", and "tiltingly", to cover the defendant's machines, then we suggest that Claim 1 reads equally well on the Parker patent, on the Miller patent, as it does on the defendant's structure.

In this matter of file wrapper estoppel, Mr. Lyon said he would like to see some authorities on that [362] point, and in addition to the authorities to set forth in our pretrial memorandum I wish to cite the following case as being in point on the same question of abandonment and file wrapper estoppel, that is, the case of *Aeration Processes, Inc. v. Lange*, 196 Fed. (2d) 981, which was a decision very recently in the Eighth Circuit Court of Appeals.

That case also holds that a patentee by cancellation of material from his specifications is estopped to contend for any interpretation of his claims in the issued patent that cover the forms of the invention originally described, but then canceled from his application.

Now, the next point on lack of infringement, the second element of plaintiff's case in proving infringement was that the elements must operate in the same way in the defendant's machines as they do in the plaintiff's patent—not the machine, but the plaintiff's patent.

It is our contention, of course, that the plaintiff has made no attempt here to prove that the defendant's machines operate as does the machine shown and described in the plaintiff's patent, and this is the only issue we are concerned with here.

The proof we suggest is very clear to the contrary, that the defendant's machines do not operate in the same manner nor have the same mode of operation as that of the machine of the plaintiff's patent. As I have said, in the defendant's [363] machines the applicators do not move axially, they move on each side of the axis—I mean in the defendant's machines they move that way, whereas in plaintiff's patent they move axially.

As Mr. Stauffer pointed out this morning, the applicator of his patent moves in a tilted fashion to get this uplifting of a body on this thing. Whereas, the evidence is that neither the defendant's machines nor the Gunderman patent have any such uplifting of the body.

In other words, in that respect that do not have, the defendant's machines do not have the same mode of operation as the plaintiff's patented machine. The defendant's machines have convex pads which do not provide any uplift to the body.

Dr. Fishbein's testimony was very clear to that effect, there is no uplifting effect by reason of the Slenderella machine operations.

In the defendant's Slenderella machines the movement, of course,—

The Court: Of course, if you had had him testify a little further he probably would have said there wasn't in the plaintiff's, either.

Dr. Fishbein didn't seem to think the human body reacted the way that the Stauffer patent says it would react to the application of this Stauffer construction.

Mr. Harris: That is right. We must remember [364] that the Stauffer patent discloses and describes quite a different thing than Mr. Stauffer manufactures and uses.

The machine showed in the Stauffer patent, in it the applicator moves only through that small arc of movement on one side of the vertical, which is not true of the Stauffer machine. The Stauffer machine moves just like Gunderman and the defendant's machine.

We are not trying a lawsuit comparing the plaintiff's machine with the defendant's machine. We are comparing what is shown and described in his patent with the defendant's machine.

The Court: The patent doesn't look a great deal like Gunderman, does it?

Mr. Harris: No, of course, it doesn't look like Gunderman, your Honor. What we are saying on that is simply that the Gunderman machine is a machine of the same general type as the defendant's machine, and if the plaintiff expands his claim to cover the defendant's machine, by the same token he is expanding his patent claim to cover the Gunderman machine, the Miller machine, the Parker machine. That goes to the question of validity more than it does to infringement, but it is relevant on both issues.

As shown by the evidence, the defendant's applicators in their movement, the applicator supports in their movement do not even overlap in any way [365] the arc of movement described and illustrated in the patent in suit. That is illustrated by this simple Keno-Matic model.

The Court: Let's determine this question of validity first. I think there is no great purpose in going into a close comparison for the purpose of infringement, unless we have a valid patent in the first instance.

Mr. Harris: Yes, your Honor. As we all know, only Claim 1 of the patent is involved in this action. If the court holds Claim 1 invalid, the plaintiff still has his patent with Claim 2 in it for whatever it is worth; the claim that covers in detail the actual construction and operation of the Stauffer machine.

So the invalidity of Claim 1 does not affect Claim

2 in any way. Mr. Stauffer keeps his patent on Claim 2.

But as to Claim 1, we suggest, first, that the court can disregard all the evidence in this case and read Claim 1 and find Claim 1 is invalid on its face, as not constituting an invention, as not covering an invention, under the authority of the Supreme Court in the Great Atlantic and Pacific Tea Company case and many, many decisions of our Court of Appeals.

We suggest that this assemblage that Mr. Lyon says is covered by Claim 1 of the patent in suit, all the elements are old there. There was nothing more than at best mechanical skill in putting them together to make a machine that would perform those functions. [366]

In that connection I think it is interesting and helpful to read what Mr. Lyon says Claim 1 covers in his pretrial memorandum, and I quote:

“The patent device is quite simple, consisting simply of a couch having an open section or slot in which is reciprocatively mounted a flat applicator or pad to tiltingly move in the slot to manipulate or massage a portion of the body of a patient.”

Couches are old in the art. Couches having slots in their top are old, couches having slots in their top through which an applicator or pad extends are old.

If the defendant's applicator moves in this tilting fashion we are talking about, all the prior art devices in the same type of art, that is old, and they all manipulate or massage a portion of the body.

If that is all this Claim 1 amounts to the claim obviously is invalid on its face; we suggest there just is no invention in it.

The Court: Let's hear what Mr. Lyon has to say in reply.

Mr. Harris: Yes.

The Court: It seems to me invention is the big hurdle that you have here, Mr. Lyon.

Mr. Lyon: All right, sir. Invention is always a problem because it is an undefinable subject. It is—— [367]

The Court: At least, it has not been defined. Maybe sometime some legislative body or court will get around to really writing a definition.

It is said there is nothing which we can understand which is undefinable, but I haven't seen a good definition.

Mr. Lyon: You never will, sir. The difficulty is there are two schools of thought as to how to determine invention.

If you take the subjective school, then we find, if we went through many years in which our judges were holding all patents invalid for want of invention, by applying a subjective test which more or less came down to this: "If I can understand it, it is too simple to be invention."

We don't think that is the proper test, and we would contend more for the objective test of invention. The objective test of invention, and it seems to me the more proper test, is what did the invention do, what did it accomplish.

There are certain criteria that are increasingly

applied by the courts. One of them is, "Did it supplant something that went before it?" Another one is, "Did it fill a long-felt want?" Another one is, "Did it increase production," such as in the Ibelle Process case.

What we have here, we have no predecessor so we can't compare the performance of the Stauffer invention to any preceding invention. These prior [368] devices in the prior art were simply paper patents that never saw the light of day. So we can't show this court where Gunderman or Miller have been driven off the market by the Parker device.

But we do have the fact that this created an immense business.

Now, this commercial success will not be considered in a case where there is a clear want of invention. But it doesn't seem to me this is a case where there is a clear want of invention.

The combination set forth by the claim, which we are relying upon, is a new combination. It is entitled to the benefits of whatever uses it can be put to.

Let's assume that Dr. Fishbein is correct and we can't cure these diseases, we can't do these beneficial things to the human body that we think we can do, even he admits that we get passive exercise. There was no passive exercise available until the Stauffer System came along, and it did it with a combination. That combination first had to have a couch so that the part of the body which is not being actively attacked, you might say, by the

applicator, can relax, and that the weight of the remaining part of the body can act as an anchor against which we manipulate the portion of the body which we are manipulating.

So the couch is an important and effective and necessary element of the claim. That rules out any [369] such anticipation, for instance, as for instance Gunderman. Gunderman, or course, was a vibrator and even if applied to a couch it wouldn't give the sort of stuff we are looking for.

If Gunderman is out, then we have only to contend with Parker, who is a file wrapper reference, and Miller. Parker, as the court has very aptly noted, has a series of six double applicators. That means that six separate zones of the body of a patient are being attacked at once, which is entirely foreign to our idea of attacking what the patent claim calls a zonal area, a single zonal area.

Finally, Miller, as Mr. Stauffer has indicated, isn't a manipulator at all. It just merely is a pressure instrument for pressing upward on the back of the body, as those straps across the chest and abdomen are tightened. I notice that the defendant's expert didn't even bother to explain that, but these straps in the Miller patent are also attached down below to the vibrating mechanism or the manipulating mechanism, so that they are cinched down as the pad 27 comes up (indicating), so that in effect you are giving an artificial respiration type treatment to the patient.

Now, does any of that prior art teach the invention of Mr. Stauffer? Does Parker? Does Parker

teach you a passive exercise table in which the majority of the body is supported on a flat table while the zonal area is manipulated against that?

I submit that he has not a head rest, and then substantially—at least, half of the body of a patient will be on the applicators. It is certainly a different thing from either what the plaintiff in this case does or what the defendant does.

Finally, Gunderman, does he teach the Stauffer invention? I submit he would not even be a relevant consideration.

We are thinking, “What would a man skilled in the art be able to do? Would he be able to synthesize the Stauffer invention from what was known in the art?”

Well, now, he wouldn't even go to Gunderman, he wouldn't go to vibrating devices that are designed to operate at 1,700 R.P.M. when he is thinking about building a device for passive exercise of the human body. He wouldn't even be looking in that bin.

So in view of the fact that as an objective fact, as a matter of evidence this patent has created a new industry; he has made both the defendant and the plaintiff into great international systems. I think it would be somewhat presumptuous for any of us to say, “That is no invention, I could have thought of that myself.”

And if it is no invention, if it is such a simple thing, if it is anticipated by the prior art, why doesn't the defendant use the prior art? The defendant can use another table if he wants to. The

defendant can use the Parker apparatus if he wants to.

But I submit on this record it is clear, having once been a licensee, having once been one of our own managers, this defendant knew that there was something important in this invention, that there was a real invention here and he therefore copied it.

The Court: Since both counsel have taken the view that only Claim 1 is involved here, I think some of the pleadings refer to Claim 2, but since everyone agrees on Claim 1 being the only claim involved in the litigation, that is the only one the court will undertake to adjudicate.

The court cannot see a great deal of similarity between Miller, Gunderman, Parker and Stauffer. They have some things in common, but it cannot be said that these that I have just enumerated anticipate Stauffer in the way that prior art is supposed to anticipate with respect to patent law.

However, the art that is involved in Stauffer is a simple art. I don't think your test, Mr. Lyon, that it is something we would have thought of, is a test to be applied, either. The test which we are to apply in determining invention, if we follow what the courts tell us, is whether the thing that is claimed to be an invention could have been conceived by the person having the usual skills in that art. [372]

Now, this art is a simple art, and the court feels that it is so simple that the structure which has been developed here by Mr. Stauffer is a structure which could reasonably be expected to have been

developed by one having ordinary skill in that art and that it just does not rise to the level of invention, as invention is protected by the patent laws.

That doesn't require us to make any finding concerning the accused structure. That is, having found that Claim 1 of the patent is invalid for want of invention, there is no need to determine whether the accused structure is one which would infringe had we here a valid claim, so I will not find on the accused structure.

But Mr. Harris has been looking unhappy during everything I have said.

Mr. Harris: No, your Honor, I am very happy. I didn't want to seem to be too happy.

The Court: The first counterclaim seeks declaratory relief, and in a sense you get that by the adjudication that Claim 1 is invalid for want of invention. I don't think there is anything in the evidence which calls for us to go further than that.

The counterclaim based upon an allegation that the Clayton Act has been violated has been withdrawn, so there is no need to find upon that. [373]

Will you prepare findings, counsel?

I am not going to find on file wrapper estoppel, either. I don't think that is necessary to the adjudication here and courts should not go further than necessary to determine the litigation immediately before them.

Mr. Harris: Yes, your Honor.

The Court: Will you prepare findings, conclusions and judgment, Mr. Harris?

Mr. Harris: Yes, I shall.

The Court: Adjourned.

(Whereupon, at 2:45 o'clock p.m., Monday, November 19, 1956, an adjournment was taken.) [374]

[Endorsed]: Filed Jan. 15, 1957.

[Endorsed]: No. 15418. United States Court of Appeals for the Ninth Circuit. Bernard H. Stauffer, Appellant, vs. Slenderella Systems of California, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 21, 1957.

Docketed: January 23, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Appeal No. 15418

BERNARD H. STAUFFER, Appellant,

vs.

SLENDERELLA SYSTEMS OF CALIFORNIA,
INC., Appellee.

STATEMENT OF POINTS ON APPEAL

The points of error of the District Court which plaintiff intends to urge on Appeal from the Judgment of the Court in favor of defendant in the above-entitled action are as follows:

I.

The District Court erred in finding that Claim 1 of said Letters Patent No. 2,240,679 in suit defines an assemblage of elements all of which were old in the prior art in which they operated in substantially the same way to produce substantially the same result, and such subject matter as a whole would have been obvious to and could have been produced by any person having ordinary skill in the art to which said subject matter pertains.

II.

The District Court erred in finding that Claim 1 of said Letters Patent No. 2,240,679 is wanting in invention.

III.

The District Court erred in failing to find that Claim 1 of Letters Patent No. 2,240,679 is infringed by defendant by the use of tables by defendant exemplified by plaintiff's Exhibits 16 and 17.

IV.

The District Court erred in concluding that Claim 1 of said Letters Patent No. 2,240,679 is invalid and void in law for lack of invention.

V.

The District Court erred in concluding that the defendant, Slenderella Systems of California, Inc., is entitled to judgment against the plaintiff, Bernard H. Stauffer, dismissing the complaint with prejudice.

VI.

The District Court erred in concluding that the defendant, Slenderella Systems of California, Inc., is entitled to judgment on its first counterclaim herein for declaratory relief, adjudging claim 1 of said Letters Patent No. 2,240,679 in suit invalid and void.

VII.

The District Court erred in failing to conclude that Claim 1 of Letters Patent No. 2,240,679 is valid.

VIII.

The District Court erred in failing to conclude that Claim 1 of Letters Patent No. 2,240,679 is infringed by defendant by the use of tables by defendant exemplified by plaintiff's Exhibits 16 and 17.

IX.

The District Court erred in ordering, adjudging and decreeing that Claim 1 of United States Letters Patent No. 2,240,679 is invalid and void in law.

X.

The District Court erred in dismissing the complaint and ordering that the plaintiff shall take nothing by his complaint herein.

XI.

The District Court erred in ordering, adjudging and decreeing that the First Counterclaim for declaratory relief adjudging Claim 1 of United States Letters Patent No. 2,240,679 invalid and void is hereby sustained.

XII.

The District Court erred in failing to adjudge that Claim 1 of Letters Patent No. 2,240,679 is valid and infringed by defendant.

XIII.

The District Court erred in granting defendant judgment for costs herein, and particularly allowing \$991.36 for defendant's Exhibits E, F, G, H, I and J and \$30.50 for defendant's Exhibit K.

Dated this 22nd day of January, 1957.

LYON & LYON,

/s/ By CHARLES G. LYON,

Attorneys for Appellant.

Affidavit of Service attached.

[Endorsed]: Filed Jan. 23, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF EXHIBITS

Book of exhibits, fifteen copies to be printed, containing:

Plaintiff's Exhibit 1—Flat copy of Stauffer Patent No. 2,240,679;

Photostatic copies of Exhibit 15—The Slenderella-Stauffer Release;

Defendant's Exhibits D-1 — Parker Patent No. 1,978,223,

D-2—Miller Patent No. 1,953,424, and

D-3—Gunderman Patent No. 1,825,588;

Defendant's Exhibit L—

1. Taylor Patent No. 86,604
2. Hardy Patent No. 1,276,526
3. Hardy Patent No. 1,391,893
4. Iverson Patent No. 1,602,196
5. Rosenquist Patent No. 1,616,065
6. Torrence Patent No. 1,910,135
7. Hardy Patent No. 1,999,412
8. Snyder Patent No. 2,036,371

The following to be treated as physical exhibits:

Exhibit 2—The Home Unit

Exhibit 3—The Movie

Exhibit 4—The Skeleton

Exhibits 5 & 6—Stauffer Booklet

Exhibits 7 through 11—Stauffer Name Plates

Exhibit 12—Minimum Price Schedule

Exhibit 13—Price List

Exhibit 16—Slenderella Drawing

Exhibit 17—Slenderella Drawing

Exhibit 18—Kinematic Model of Exhibit 16

Exhibit 19—Kinematic Model of Exhibit 17

Defendant's Exhibits:

A-1, A-2 & A-3—Drawings of Stauffer Machine

B-1—File Wrapper of Stauffer Pat. No. 2,240,-
679

C—Drawing illustrating Slenderella Motion

E—Photographic Enlargement of Figure 6 of
Gunderman Patent No. 1,825,588

F—Kinematic Model of Gunderman Patent No.
1,825,588

G—Photographic Enlargement of Figures 4, 5 &
6 of Miller Patent No. 1,953,424

H—Kinematic Model of Miller Patent No.
1,953,424, Figure 4

I—Photographic Enlargement of Sheet 1 of Par-
ker Patent No. 1,978,223

J—Kinematic Model of Figure 2 of Parker Pat-
ent No. 1,978,223

K—Drawing with movable arm.

Concerning the books of exhibits, appellant will furnish fifteen copies of Exhibits 1, D-1, D-2, D-3, and L-1 through L-8. We ask the Clerk to secure fifteen photostatic copies of Exhibit 15.

Exhibits identified at the trial, other than those listed as physical exhibits or to be made a part of the book of exhibits, were not admitted in evidence.

Dated this 29th day of January, 1957.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Plaintiff-
Appellant

Affidavit of Service attached.

[Endorsed]: Filed Jan. 30, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION

Some question having arisen as to whether the appellant has properly designated the record in accordance with R.C.P. 75 and Rule 17.6 of this Court, please be advised that the appellant designates the entire record as certified by the Clerk of the District Court as the record on appeal in this case, including all of the pleadings, all of the exhibits received in evidence and the entire transcript of the trial, all to be printed with the exception of the exhibits designated as physical exhibits in the designation of exhibits heretofore filed.

Dated: February 1, 1957.

LYON & LYON,
/s/ By CHARLES G. LYON,
Attorneys for Plaintiff-
Appellant

Affidavit of Service attached.

[Endorsed]: Filed Feb. 4, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION

Appellee in the above-entitled appeal hereby designates that Defendant's Exhibit B-1, the file-wrapper and contents of patent No. 2,240,679 in suit, should be printed as a part of the printed record on appeal.

Dated: February 5, 1957.

HARRIS, KIECH, FOSTER &
HARRIS,

FORD HARRIS, JR.,

/s/ By FORD HARRIS, JR.

NEWLIN, TACKABURY &
JOHNSTON,
HUDSON B. COX

Attorneys for Appellee.

Affidavit of Service attached.

[Endorsed]: Filed Feb. 6, 1957. Paul P. O'Brien,
Clerk.

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